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CIVIL RIGHTS IN EMPLOYMENT: THE NEW GENERATION

LINDA L. HOLDEMAN*

In July 1989, Title VII was twenty-five years old. It is generally assumed that the first twenty-five years have seen significant changes in the economic opportunities available to America's minorities and women. But with the rise to power of the Reagan appointees, the Supreme Court is clearly fashioning a new approach to issues of civil rights in employment. This article analyzes the new Court's emerging themes and proposes a congressional response.

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I. INTRODUCTION

It is a new day. With civil rights activists reeling from blow after blow to hard-won victories of Title VII's first twenty-five years, the 1988 term has ended. As the dust settles and initial reactions moderate, it remains clear that the new majority has begun to re-fashion civil rights law in the employment arena.

First came *City of Richmond v. J.A. Croson Co.*,[1] narrowing, perhaps to impossible limits, the evidentiary basis necessary to defend minority set-asides of public contracts.[2] *Wards Cove Packing Co., Inc. v. Atonio*[3] drastically increased the difficulty of proving a disparate impact case, and rendered some kinds of employment practices virtually immune from disparate impact analysis.

Martin v. Wilks[4] followed, allowing subsequent collateral attacks upon existing Title VII consent decrees, with no apparent time limitation. *Martin's* impact was magnified by *Independent Fed'n of Flight Attendants v. Zipes*,[5] which held that Title VII plaintiffs may not recover their attorneys' fees against intervenors unless the intervenors' action was frivolous or unreasonable.

Martin was handed down with *Lorance v. AT&T Technologies, Inc.*,[6] which held that Title VII's 180 day[7] limitations period for challenging an intentionally discriminatory seniority system begins to run when the seniority system is adopted rather than when the challenged provision is first applied to the plaintiff. This is true despite the fact that the statute of limitations will often expire before any employee has actually been adversely affected or before potentially affected employees have been notified, and in some cases there may not have been a plaintiff with standing to bring the case during the fatal 180 days.

Public Employees Retirement System of Ohio v. Betts[8] further restricted challenges to seniority systems, holding that in age discrimination cases, the plaintiff bears the burden of proving actual intent to use the seniority system in order to discriminate on the basis of age in other aspects of the employment relation.

Patterson v. McLean Credit Union[9] held that 42 U.S.C. § 1981 does not

1. 109 S. Ct. 706 (1989).
2. A minority set-aside provision reserves some portion of public contracting funds for award to minority business enterprises. *See infra* § II A1(a).
3. 109 S. Ct. 2115 (1989).
4. 109 S. Ct. 2180 (1989).
5. 109 S. Ct. 2732 (1989).
6. 109 S. Ct. 2261 (1989).
7. 42 U.S.C. § 2000e-5(e) requires a charge to be filed with the EEOC within 180 days of the alleged violation. However, if a charge is filed with a state or local deferral agency, the limitations period for the EEOC charge is extended to 300 days.
8. 109 S. Ct. 2854 (1989).
9. 109 S. Ct. 2363 (1989).

cover any "post-contract" conduct such as discharges from employment or racial harassment, even if such harassment is severe and pervasive enough to interfere with continued employment. The only victory for employment law plaintiffs came in *Price Waterhouse v. Hopkins*,[10] which required a disparate treatment defendant, who had acted out of both permissible and impermissible motives, to show that it would have made the same decision even absent the impermissible motive. Even *Price Waterhouse* proved to be only a partial victory, as it decided a number of issues in favor of employers.

A closer examination of these 1988 term cases yields telling clues to the new majority's philosophy, and those clues do not bode well for the economic future of minorities and women. Congress must re-visit the areas of equal employment and affirmative action if the level of equal employment opportunity which has been attained after twenty-five years of struggle is to be preserved.

II. THE CASES

A. *Affirmative Action and Reverse Discrimination*

The Court has never been at peace with affirmative action.[11] Yet, despite the Reagan administration's avowed intention to kill it, affirmative action emerged from the 1986 and 1987 terms alive, well and perhaps even more firmly implanted as a basic principle of American business.[12]

But even in the 1987 term, a new breeze was beginning to blow against race conscious remedial action. In *Johnson v. Transportation Agency*,[13] then newly appointed Justice Scalia filed a vigorous dissent, joined by Chief Justice Rehnquist and Justice White, attacking the entire rationale underlying affirmative action.[14] The appointment of Justice Kennedy added a fourth vote to the anti-affirmative action camp. With the support of the more moderate Justices Stevens and O'Connor, a controlling conservative coalition has formed. *City of Richmond v. J.A. Croson Co.*[15] is the first result.

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10. 109 S. Ct. 1775 (1989).

11. "Agreement upon a means for applying the Equal Protection Clause to an affirmative-action program has eluded this Court every time the issue has come before us." Wygant v. Jackson Bd. of Education, 476 U.S. 267, 301 (1986) (Marshall, J., dissenting); *see generally* L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW 270-303 (2d. ed. 1988) ("Term after term, and continuing to date, the Supreme Court has striven to determine the legitimacy of racial, ethnic and sexual preferences in employment. Inevitably, the broad pronouncements of early cases were forced to yield to the impact of facts unforeseen or insufficiently appreciated.") *Id.* at 270; *see also* Jones, *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383 (1988); Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901 (1985).

12. Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524 (1987).

13. 480 U.S. 616 (1987).

14. *Id.* at 657.

15. 109 S. Ct. 706 (1989).

1. *City of Richmond v. J.A. Croson Co.* (fourteenth amendment restrictions on race-conscious remedies)

a. *Factual Background*

The history of *City of Richmond* actually began in the mid-1970s when Congress undertook to analyze and document the gross underrepresentation of minority-owned businesses in the nation's business arena. A number of congressional and agency studies found that pervasive racial discrimination had seriously impaired the ability of minorities to form and competitively operate business ventures.[16] Congressional and agency reports specifically isolated the construction industry as one of the areas in which an evolved business system, though facially neutral, operated to perpetuate past inequities.[17]

Faced with this record, Congress enacted a minority set-aside provision[18] as part of the Public Works Employment Act of 1977 ("Act").[19] The Act appropriated four billion dollars in federal funds for grants to be used by state and local governments for public works projects. The Act contained a set-aside provision which required grantees to use at least ten percent of grant funds for contracts with minority business enterprises ("MBEs").[20] The set-aside provision included a waiver procedure for use where MBEs were not available or where an MBE attempted to exploit the program by overcharging for goods or services.[21]

In *Fullilove v. Klutznick*,[22] the Supreme Court held that this minority set-aside requirement passed constitutional muster under either intermediate scrutiny or strict scrutiny. The Court found that Congress had abundant evidence from which to conclude that minority-owned businesses had been denied effective participation in federal public contracting,[23] that the evidence before Congress showed that the pattern of

16. *See, e.g.*, H.R. REP. No. 468, 94th Cong., at 1-2 (1975) (Report of House Committee on Small Business) (past inequities have contributed to current lack of participation; minorities comprise 16% of population but minority businesses realize only 0.65% of gross business receipts); H.R. REP. No. 1615, 92d Cong., at 3 (1972) (Report of the Subcommittee on Minority Small Business Enterprise ("long history of racial bias" resulting in "major problems" for minority owned businesses)); H.R. DOC. No. 169, 92d Cong., at 1 (1971) (paucity of minority business ownership); H.R. REP. No. 1615, 92d Cong., at 3 (1972); H.R. DOC. No. 194, 92d Cong., at 1 (1972).

17. H.R. REP. No. 1791, 94th Cong., at 182 (1977) (summarizing H.R. REP. No. 840, 94th Cong., at 17 (1976)); U.S. GENERAL ACCOUNTING OFFICE, QUESTIONABLE EFFECTIVENESS OF THE 8(A) PROCUREMENT PROGRAM, GGD-75-57 (1975); U.S. COMM'N ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS 16-28, 86-88 (May 1975) (barriers encountered by minority businesses in government contracting at federal, state and local levels); H.R. REP. No. 468, 94th Cong. (1975) (existing efforts to increase minority participating in public contracting "totally inadequate").

18. 42 U.S.C. § 6705(f)(2) (1982).

19. 42 U.S.C. § 6701 (1982).

20. A "minority business enterprise" was defined by the Act as "a business at least 50% of which is owned by minority group members or, in case of a publicly owned business, at least 51% of the stock of which is owned by minority group members." 42 U.S.C. § 6705 (f)(2) (1982).

21. 42 U.S.C. § 6705 (1982).

22. 448 U.S. 448 (1980).

23. "Congress had before it . . . evidence of a long history of marked disparity in the

discrimination existed in state and local contracting as well,[24] and that the set-aside provision was narrowly tailored to counteract that pattern of discrimination.[25]

Three years after *Fullilove*, the Richmond City Council undertook to study the status of the city's public contracting business.[26] The council reviewed the array of congressional documentation of the present effects of past discrimination in the construction industry, including state and local public contracting. The congressional record reflected that 16-18% of the country's population was made up of minority individuals, while only 0.65% of business gross receipts were realized by minority businesses. As disturbing as these statistics were, the Richmond City Council found that the Richmond public contracting statistics were three times worse. Richmond's minorities numbered slightly over half the city's population (as compared to the 18% national percentage), but still accounted for only 0.67% of public construction spending during the preceding five years.[27]

The council also heard testimony from a number of city officials that the local construction industry had a long exclusionary history. No witness denied local industry discrimination. The council heard testimony that the area trade associations had virtually no minorities among their roughly 400 members.[28] Exclusion from these skilled trade unions and training programs prevented minorities from following the traditional career and training path from laborer to entrepreneur.

Relying upon the uncontroverted evidence of local discrimination in the construction industry, and the uncontroverted evidence that local minority participation was three times worse than the national statistics found by Congress, the Richmond City Counsel adopted the Minority Business Utilization Plan ("Plan"), modeled closely after the federal set-aside program approved in *Fullilove*.[29] The Plan provided that at least thirty percent of the dollar amount of each city construction contract must be sub-contracted to MBEs.[30] The Plan was limited to a five year life and provided for a waiver if qualified and willing MBEs were unavailable.

Approximately six months after the Plan's enactment, the City of Richmond invited bids on a plumbing project at the city jail.[31] The cost of the fixtures would constitute approximately seventy-five percent of the project price. The regional manager of J.A. Croson Company

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percentage of public contracts awarded to minority business enterprises" resulting from "the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Id.* at 478.

24. *Id.*
25. *Id.* at 480-89.
26. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).
27. *Id.* at 714.
28. *Id.* at 742 (Marshall, J., dissenting).
29. *Id.* at 739.
30. Ordinance No. 83-69-59, *codified in* Richmond, Va., City Code, § 12-156(a) (1985).
31. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 715 (1989).

("Croson"), was interested in bidding on the project. Twelve days before bids were due, Croson contacted several local MBEs that were potential suppliers of the particular brands of fixtures required by the project. One of the MBEs contacted was Continental Metal Hose ("Continental"). Continental was a distributor and would have to purchase the fixtures elsewhere for resale to Croson.

Continental sought quotations for the fixtures in order to prepare its bid, but encountered difficulties in obtaining any quotations. One of the possible suppliers, a white-owned business, had already given a quotation directly to Croson and refused to give a quotation to Continental. The agent of the other possible supplier refused to do business with Continental without a credit check, which would take at least thirty days to complete. Continental informed Croson that these difficulties were delaying Continental's bid.

Project bids were opened on October 13 and Croson was the only bidder. On October 19 Croson filed a request for waiver of the set-aside provision. Prior to a decision on the request, Continental secured a quote from another supplier and submitted a bid to Croson. However, the bid was seven percent higher than the fixture price Croson had included in its bid for the project. That figure was presumably based on the quote made directly to Croson by the white-owned supplier or on bids from other white-owned businesses.

Croson persisted in the waiver request, arguing that Continental was not an authorized supplier for the brands specified (despite the fact that it was Croson who had solicited Continental's bid), and arguing that Continental's bid was seven percent higher than the fixture price of Croson's project bid. The city denied the waiver request, declined to raise the contract price, and subsequently decided to reopen the project for new bids.

Rather than submitting an adjusted bid reflecting Continental's participation, Croson filed suit, arguing that the Richmond set-aside plan violated the equal protection clause of the fourteenth amendment. After the case had progressed through a lengthy procedural history,[32] the United States Supreme Court noted probable jurisdiction to consider the constitutionality of the Plan.[33]

b. *City of Richmond* opinion

Writing for the Court, Justice O'Connor found the Richmond Plan to be constitutionally infirm. Though portions of the opinion com-

32. The district court upheld the Plan in all respects. *See* Supplemental App. to Juris. Statement 112-232 (Supp. App.). The United States Court of Appeals for the Fourth Circuit affirmed. Croson v. City of Richmond, 779 F.2d 181 (4th Cir. 1985) (*Croson I*). The Supreme Court vacated the Fourth Circuit opinion and remanded in light of Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). *See* Croson v. City of Richmond, 478 U.S. 1016 (1986). On remand the Fourth Circuit struck down the set-aside plan as violative of the fourteenth amendment. Croson v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987) (*Croson II*). The Supreme Court granted certiorari from the 1987 Fourth Circuit opinion.

33. 108 S. Ct. 1010 (1988).

manded less than a majority, most of the opinion reflected at least a broad consensus on the part of the six subscribing justices.[34]

In what is probably its most significant holding, *City of Richmond* holds that remedial racial classifications are suspect and, as such, are subject to strict scrutiny.[35] The degree of the majority's hostility to remedial race-conscious classifications was evident throughout the majority and concurring opinions, and was expressly reflected in the application of the strict scrutiny standard.[36] In what is becoming a familiar pattern, Justice O'Connor purported to seek a conceptual middle road between "rather stark alternatives,"[37] but then set out an evidentiary burden that destroyed the middle road she purported to construct.[38]

Under strict scrutiny, the state must identify and prove a compelling interest which justifies the remedial racial classification, and the classification must be narrowly tailored to address that interest. Justice O'Connor, joined by Chief Justice Rehnquist and Justice White, concluded that the city's interest in remedial race-conscious action was sufficiently compelling only if it could show that such action was necessary in order to eradicate the effects of the city's own prior discrimination, or that the city had become a passive participant in a system of racial exclusion practiced by the local construction industry.[39]

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34. Section II commands the support of only its author, Chief Justice Rehnquist, and Justice White; Section IIIA, only the support of these three Justices and Justice Kennedy.

35. *City of Richmond*, 109 S. Ct. at 721. Chief Justice Rehnquist and Justices O'Connor, White, Kennedy and Scalia adopted the strict scrutiny standard. Justice Stevens avoided the issue and focuses instead on the need to identify the characteristics of disadvantaged classes which might justify special treatment. *Id.* at 732.

36. Historically, virtually no legislative action has withstood strict scrutiny analysis; the application of strict scrutiny is usually the death knell of the challenged provision. Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). There are rare exceptions in which a legislative classification has survived strict scrutiny; *e.g.*, *Fullilove*, 448 U.S. 448 (1980).

37. *City of Richmond*, 109 S. Ct. at 717.

38. Last term in Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988), Justice O'Connor struggled conceptually for a middle ground between the "stark and uninviting alternatives . . ." of whether to apply disparate impact analysis to subjective employment decisionmaking (which alternative might induce employers to adopt surreptitious quota systems) or to restrict disparate impact analysis to objective employment practices (which alternatives might induce all employers to interject subjective elements and so invalidate the disparate impact model entirely). *Id.* at 2786. But her introduction of a newly articulated disparate impact proof model (now confirmed by *Wards Cove Packing Co.*, *infra* at p. 66) belied her conceptual struggle. *See*, Holdeman, *Watson v. Fort Worth Bank and Trust: The Changing Face of Disparate Impact*, 66 DEN. U.L. REV. 179 (1989).

39. *City of Richmond*, 109 S. Ct. at 720. The decision in Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) had raised doubt as to whether the State had authority to employ race-conscious remedies to eradicate the effects of discrimination other than its own. Justices Kennedy and Scalia would so hold, but Justice Kennedy aptly noted that such a holding was not essential since the strict scrutiny standard was already sufficient to defeat the Plan. *City of Richmond*, 109 S. Ct. at 734. Justice Stevens' position was not fully fleshed out, but would seem to be less limiting than Justice O'Connor's. Justice Stevens was willing to consider compelling interests in present and future consequences, such as the school board's argument in Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), that an integrated faculty provided educational benefits to students. *Id.* at 731.

Even more surely fatal for such legislation than the nature of, or factual basis necessary to establish, the requisite compelling interest (e.g., that race-conscious action is necessary to eradicate the effects of past discrimination, and that such discrimination was practiced by the city or that the city was a passive participant in discrimination by the local industry) is the level of proof which is required to establish the factual basis. The proof requirements imposed by the majority reject normal circumstantial proof and exceed proof requirements in civil litigation.[40]

In finding the city's interest in race-conscious action justified, the district court had relied upon the following evidence: (1) the congressional determination that past discrimination in the construction industry had resulted in stifled minority participation on both national and local levels, and the congressional studies and hearings which supported that determination; (2) the fact that MBEs were awarded only 0.67% of city construction dollars while minorities constituted roughly 50% of the city's population; (3) the fact that there were almost no MBEs represented in local contractors' associations; (4) the testimony of witnesses that widespread discrimination was practiced in the local construction industry; and (5) the ordinance's express declaration of its remedial purpose.

First, the majority discounted both the congressional declaration of industry discrimination and the array of congressional and agency studies which were sufficient to uphold the congressional minority set-aside approved in *Fullilove*. Congress had essentially created a presumption, applicable to each state and local jurisdiction, that construction industry discrimination had stifled minority participation. But a state or local government could rebut the presumption by showing evidence negating any local discrimination.[41]

The majority in *City of Richmond* reasoned away the proof value of the congressional *presumption* of discrimination by holding that, because it was rebuttable, it had "extremely limited" probative value.[42] This

40. The majority suggested that evidence akin to a *prima facie* case against named persons would be required. "There is nothing approaching a *prima facie* case of a constitutional or statutory violation by *anyone* in the Richmond construction industry." *City of Richmond*, 109 S. Ct. at 724 (emphasis in original). *See also id.* at 729, where Justice O'Connor criticized the Plan because "there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors."

41. *See* Fullilove v. Klutznick, 448 U.S. 448, 487 (1980). The authority for *Fullilove's* declaration that the congressional set aside program provided local governments the opportunity to demonstrate the lack of local discrimination is unclear. The statute itself does not provide for such a waiver. 42 U.S.C. § 6705(f)(2) (1982). Section 6706 empowers the Secretary of Commerce, acting through the Economic Development Agency, to prescribe regulations implementing the set-aside provision. Those regulations allow a waiver if there are no MBEs in a "reasonable trade area," but make no mention of rebutting the presumption of discrimination in the local construction industry.

42. The probative value of [the congressional] findings for demonstrating the existence of discrimination in Richmond is extremely limited. By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to

proposition is contrary to any conventional understanding of the effect of a presumption.

The minimum operative effect of a presumption is that it shifts the burden of producing evidence with regard to the presumed fact, at least until some contrary evidence is offered.[43] In *City of Richmond*, the city counsel began with the congressional presumption, and then heard additional evidence which supported the presumption. Not one witness or fact called the presumption into question, either during the fact finding process,[44] or later at trial.[45] So the majority's treatment of the evidentiary value of the presumption is puzzling indeed.

Second, the majority reasoned away the congressional *evidence* which was the foundation for the presumption by pointing to the congressional power to enforce the fourteenth amendment under section five, a power not conferred upon state and local governments.[46] The majority did not explain the non sequitur that a difference in enforcement power would affect the probative value of evidence itself.

The opinion also discounted the congressional evidence because it was national in scope rather than specific to the City of Richmond. Although the Court is correct in noting the national scope of such evidence, the congressional facts and findings did include direct evidence that the pattern of discrimination in the construction industry existed in state and local public construction contracting.[47]

Moreover, the majority rejected the testimony of local witnesses to "widespread" discrimination, including even the testimony of the city manager who supervised city procurement matters, as being too general and too conclusory,[48] despite the fact that the testimony of witnesses such as the city manager would normally be regarded as expert rather than lay testimony and would thus be entitled to include expert conclusions.[49] The Court held that the city council's declaration of remedial purpose was too self-serving to be entitled to weight, despite principles of comity and the deference generally accorded to the factfinding process of legislative bodies. However, as Justice Marshall observed, the Court has held that "[l]ocal officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well-qualified to make determinations of public good 'within their respective spheres of authority.' "[50]

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market area. *See Fullilove*, 448 U.S. at 487 (noting that the presumption that minority firms are disadvantaged by past discrimination may be rebutted by grantees in individual situations).

City of Richmond, 109 S. Ct. at 726.

43. McCORMICK ON EVIDENCE 973-76 (E. Cleary ed. 3d. ed. 1984).

44. *City of Richmond*, 109 S. Ct. at 743 (Marshall, J., dissenting).

45. *Id.* at 749.

46. *Id.* at 726-727.

47. Fullilove v. Klutznick, 448 U.S. 448, 478 (1980).

48. *City of Richmond*, 109 S. Ct. at 743, n.5 (1989) (Marshall, J., dissenting).

49. Part of the function of an expert witness is to draw inferences from the facts which a factfinder would not be competent to draw, or to offer an expert opinion which will aid the factfinder in understanding the facts. McCORMICK, *supra* note 43, at 33.

50. *City of Richmond*, 109 S. Ct. at 748 (Marshall, J., dissenting) (quoting from Hawaii

Finally, the Court rejected the most telling evidence of all, the gross statistical disparity between the percentage of the city's minority population and the percentage of prime contracts awarded to minority firms.[51] Rather than comparing the contract dollars awarded to MBEs with the general population statistics, Justice O'Connor held that the proper statistical model is the comparison between the contract dollars awarded to MBEs and the number of existing qualified MBEs. No doubt the conceptual justification for this choice is the rejection of race-conscious preference as a remedy for historic society-wide discrimination.[52]

However, the evidentiary result is inappropriate. The Court's effort to isolate past discrimination in the construction industry from past society-wide discrimination effectively deprives the statistical tool of its ability to measure *past* discrimination of any kind. It is elementary market place economics that few small businesses subject to significant limitations in procuring business opportunities will long survive. Nor does the majority's statistical formula account for the numbers of MBEs which might have been formed but for widespread knowledge in the minority community of industry discrimination. Only the foolish would undertake to acquire the "special qualifications" which Justice O'Connor correctly observes are necessary,[53] when other such minority enterprises are failing on all sides.

Use of qualified labor market statistics are appropriate in some contexts. The Court has correctly required such a statistical analysis when the task is to measure *current* discrimination.[54] But a requirement of qualified labor market statistics is manifestly inappropriate when, as here, the task is to measure the effects of *past* discrimination. While some portion of the disparity between contracts awarded and general population statistics may be due to society-wide discrimination, it is unlikely that a local society which discriminated to the extent evidenced by the Richmond statistics would be home to a construction industry free of that same sort of discrimination. This kind of reasoning process is precisely the nature and function of circumstantial evidence in a courtroom.[55]

The same problems are apparent in the Court's rejection of the city's evidence that MBE membership in area trade organizations was extremely low. The Court held that this evidence would be relevant only if it were compared to the number of MBEs eligible for membership. But again this sort of statistical comparison can only measure current discrimination; it cannot measure the effect of past discrimination which has resulted in a dearth of local MBEs. And again, even if some

Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984)); *see also* Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 777-78 (1982) (O'Connor, J., concurring in judgment in part and dissenting in part).

51. *City of Richmond*, 109 S. Ct. at 725.

52. *Id.*

53. *Id.*

54. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

55. *See infra* p. 79.

portion of the disparity were due to societal discrimination, the Court's conclusion that the membership statistics had no probative value reflects a further rejection of normal circumstantial evidence.

Circumstantial evidence is evidence which requires additional reasoning to reach the proposition to which it is directed;[56] in effect, it is evidence that circumstances are as one would expect them to be if the fact in question were true. In *City of Richmond*, much of the rejected or undervalued evidence is circumstantial in nature. The congressional record and legislation created a presumption that discrimination in the local construction industry had caused the low level of minority participation in the industry. The dearth of minority contractors in the area trade associations, and the dearth of minority contractors awarded prime contracts constituted strong circumstantial evidence in support of the presumption. Yet the Court rejected this evidence because although the national statistics established a nationwide pattern of industry discrimination, the Richmond statistics might be the result of entrepreneurial choices made by blacks in Richmond; or the Richmond statistics might be a result of societal discrimination rather than industry discrimination. This hypothesis implicitly conjectures that Richmond's construction industry, though a part of a local society which discriminated three times as much as the national construction industry (which itself was grossly discriminatory) was untainted by either local or national racism.

These examples demonstrate the Court's rejection of the normal function of circumstantial evidence. They also raise the question of what standard of proof was required by the Court's strict scrutiny analysis. The majority seemed to be requiring far more than clear and convincing evidence. By requiring the city to disprove such unlikely causes as the possibility that blacks in Richmond, Virginia have equal access to the construction industry, but choose instead to become bankers or university professors, the Court seems to be requiring nothing less than proof to a moral certainty. In order to justify a remedial racial classification by a state or local government, the Court required proof tantamount to a criminal conviction of an industry. On the face of the opinion, remedial legislation is subjected to the same fatal constitutional standard as anti-minority segregation statutes. Such a construction of the fourteenth amendment is incongruous with its historical context and the traditional rationale underlying strict scrutiny. The fourteenth amendment and strict scrutiny did not arise in a historical vacuum, and are not predicated on an abstract principle that race consciousness is *malum en se*. Rather, they are remedial measures to eradicate the pernicious effects of anti-minority segregation statutes. Race-conscious remedial legislation has not been so pernicious and can hardly bear the same historical and cultural stigma as Jim Crow laws. Yet the *City of Richmond* decision holds both forms of legislation to be equally suspect.

56. MCCORMICK, *supra* note 43, at 543.

Not only did the majority underrate the probative value of each individual piece of evidence, but it failed entirely to consider the cumulative weight of the evidence. Repeatedly the majority held that the specific evidence being discussed was insufficient, "standing alone," to justify remedial action.[57] Nowhere did the majority consider the combined probative value of the city's direct and circumstantial evidence of discrimination. The device of separately analyzing items of circumstantial proof in isolation is a classic method of de-valuing each item. However, as Professor McCormick has observed:

> But when [circumstantial evidence] is offered and judged singly and in isolation, as it frequently is, it cannot be expected by itself to furnish conclusive proof of the ultimate fact to be inferred. Thus the common argument of the objector that the inference for which the fact is offered "does not necessarily follow" is untenable, as it supposes a standard of conclusiveness which probably no aggregation of circumstantial evidence, and certainly no single item thereof, could ever meet.[58]

Moreover, strict scrutiny analysis requires more than evidence sufficient to prove the existence of past industry discrimination. The evidence must be specific enough to enable the governmental actor to prove that the scope of the race-conscious remedy does not exceed the compelling interest which justifies it.[59] A strict and rigid construction of such an inherently difficult task would effectively prevent any race-conscious action, and such seems to be the effect, if not the intent, of the majority opinion. Just as it would be "sheer speculation how many minority firms there would be in Richmond absent past *societal* discrimination,"[60] it is and always will be "sheer speculation" how many minority firms there would be in Richmond absent past *construction industry* discrimination. To require proof of that sort renders defense of race-conscious remedial legislation a virtual impossibility. The statistical evidence in *City of Richmond* forced a choice between running the risk of addressing some societal discrimination in an affirmative action program and failing to address any past discrimination including industry discrimination. The majority's choice of the latter option reveals that the Court is willing to leave even industry discrimination unredressed rather than risk imposing on a particular industry any share of the burden of redressing societal discrimination.[61]

The majority opinion devoted little attention to the second prong of equal protection analysis, narrow tailoring. Justice O'Connor observed that the lack of quantified proof of precisely identified discrimination

57. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 723-728 (1989).
58. MCCORMICK ON EVIDENCE 436 (E. Cleary ed. 2d ed. 1972).
59. *City of Richmond*, 109 S. Ct. at 726-728.
60. *Id.* at 724 (emphasis added).
61. Even if the 30% set-aside did partially address societal discrimination, the burden on the industry was almost non-existent. As Justice Marshall pointed out, public construction accounted for only 3% of local construction. *Id.* at 750 (Marshall, J., dissenting). Thus the set-aside affected only 1%, and if even half of the set-aside addressed societal discrimination, that would affect only 0.5% of Richmond's construction market.

rendered the determination of whether the Plan was narrowly tailored "almost impossible."[62] In addition, she pointed to the city's failure to first consider race-neutral alternatives and failure to justify the selection of thirty percent as the set-aside percentage.[63] Finally, she found fault with Richmond's adoption of the congressional definition of an MBE, which included Oriental, Indian, Eskimo or Aleut business owners,[64] and with the unlimited geographic scope of the Plan.[65]

Certainly race-conscious state action should not be undertaken if there are viable alternatives. However, it would have been reasonable to find that the city had concluded that other alternatives were ineffective. In 1975, the city had enacted a city code provision prohibiting discrimination by contractors.[66] Yet there were still virtually no minority-owned contractors in area trade associations. Further, the congressional record before the city council included the congressional finding that alternatives other than race-conscious action were not effective to address the effects of past discrimination in the construction industry.[67] Nonetheless, the record was not strong that the city had genuinely considered alternatives to the set-aside provision.

The majority's objection that the selection of the thirty percent figure was not justified by the city is less compelling. As Justice Marshall observed, the thirty percent figure was patterned directly on the method of calculation approved in *Fullilove*.[68] Congress had selected its ten percent figure because it fell roughly halfway between the percentage of minority contractors and the percentage of minority population. Application of the same calculation to the city's evidence yielded the thirty percent figure. The calculation allowed a healthy margin to account for the effects of societal discrimination, and yet provided a significant encouragement to the entry of minority owned businesses in the market.

Nor did the thirty percent figure key to "outright racial balancing" or rest upon the "assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population"[69] as Justice O'Connor stated. Instead, the thirty percent figure provided a cushion of roughly fifty percent to allow for societal discrimination, career choices, or other factors effecting the dearth of minorities in the market.

The majority's insistence on strong evidence that the race-conscious remedy does not overstep the effects of past industry discrimination is one of the most serious evidentiary hurdles in the strict scrutiny analysis. Logically, it should be possible to overcome this hurdle, despite the impossibility of distinguishing the effects of industry discrimi-

62. *Id.* at 728.
63. *Id.*
64. *Id.* at 713.
65. *Id.*
66. Richmond, Va., Code, 17.2 (1985).
67. *City of Richmond*, 109 S. Ct. at 751 (Marshall, J., dissenting).
68. *Id.* at 751-52.
69. *Id.*at 728.

nation from societal discrimination with certainty and precision, if the race-conscious remedy is limited so as to provide reasonable assurance that it did not exceed the bounds of the effects of past industry discrimination. The *City of Richmond* formula effectively conceded half of the existing disparity to societal discrimination and so refrained from redressing the disparity beyond the thirty percent remedy. Yet the majority's rejection of Richmond's thirty percent calculation is an implicit rejection of this method of insuring that the race-conscious remedy does not overstep its bounds.

Nor does the Court offer any explanation of its rejection. If the Court's reason for requiring evidentiary precision is, in fact, the legitimate concern that race-conscious remedies should be limited to the effects of past industry discrimination, there is no reason to reject a Plan that settles for a substantially smaller race-conscious remedy than past discrimination might justify. A fifty percent cushion surely insures that the remedy does not inadvertently address societal discrimination to any significant degree. It would appear then, that the insistence on precision, even when unnecessary to accomplish the Court's stated justification, is simply another device to insure the demise of race-conscious remedies.

In its defense of the new strict scrutiny standard, the Court relies on the assertion that this Plan was imposed on the construction industry by a black majority.[70] However, the Court does not limit the application of strict scrutiny to that context. Indeed such a characterization of the *City of Richmond* facts is questionable. The Court inferred that the Plan resulted from overreaching by a racial majority because the population of Richmond was fifty-two percent black (failing to inquire as to the racial breakdown of registered voters), the city council was composed of four whites and five blacks (though the vote on the Plan did not divide along racial lines), the Plan included groups other than blacks in its definition of MBEs (which logically tends to disprove rather than support the Court's inference), and the Plan's failure to restrict MBEs to local businesses (which also tends to negate a charge of self-interested overreaching by a local majority). The Court's readiness to find illicit discrimination by a black majority stands in dramatic contrast to the presumption of innocence afforded the white construction industry.

Yet the larger issue raised by the Court, concerning remedial legislation which favors a group which constitutes the majority within a given jurisdiction, is a real issue and must be answered. The most oppressive discrimination against racial groups has often occurred in localities where those racial groups are a numerical majority of the populace. The overall statutory scheme of the 1960's civil rights legislation relied substantially on the Voting Rights Act of 1965 to empower disadvantaged racial groups to enact state and local legislation to redress the inherited legacy of socio-economic injustice. As the Voting Rights Act begins to

70. *Id.* at 722.

achieve its purpose, the strict scrutiny standard is invoked to thwart any translation of political equality into economic equality.

It is admittedly appropriate for the federal courts to remain especially alert to preclude legislative oppression of minorities by majorities. However, the strict scrutiny standard, as implemented in *City of Richmond*, exceeds cautious regard for fair treatment of a racial minority. It is the denial of political redress for racial discrimination. Political action by a majority which is socially and economically marginalized is simply not equivalent to political action by a majority which is also socially and economically dominant. The earlier standard of intermediate review was appropriate to safeguard the interests of an economically dominant numerical minority. The *City of Richmond* strict scrutiny standard denies both the democratic interest in allowing majority rule and the social policy in favor of achieving equal opportunity for economically marginalized racial groups. The judicial over-riding of majority rule is appropriate to curtail oppression but not to thwart the redress of legitimate grievances.

The significance of *City of Richmond* would be hard to overstate.[71] The adoption of strict scrutiny analysis applies to all governmental race-conscious action, and will generally defeat all such efforts.[72] Further, it signals that private voluntary affirmative action is in jeopardy, and that judicially imposed race-conscious remedies will be closely examined.

2. *Martin v. Wilks* (collateral attack upon consent decree)

In 1974, a group of black individuals and a branch of the NAACP filed class actions against the City of Birmingham, Alabama, alleging racial discrimination in hiring and promotion in city employment. After trial but before a judgment was entered, the parties agreed to the entry of consent decrees setting out extensive remedial hiring and promotion goals.[73] The district court published notices and held fairness hearings on the proposed decrees. The Birmingham Firefighters Association ("BFA") appeared as amicus curiae and filed objections to the proposed decrees. After the hearings, the BFA also moved to intervene on the grounds that the decrees would affect the rights of its members. The district court denied the motion as untimely and subsequently approved and entered the decrees.[74] Seven white members of the BFA then filed suit against the city seeking an injunction against enforcement of the decrees on the grounds that the decrees would illegally discriminate

71. One intriguing result of *City of Richmond* may be its effect on the level of scrutiny adopted for sex discrimination. If white males constitute a "suspect classification" it may be difficult to maintain intermediate scrutiny of discrimination against women. Craig v. Boren, 429 U.S. 190 (1976).

72. As Justice Marshall correctly observes, "strict scrutiny is strict in theory, fatal in fact." City of Richmond v. J.A. Croson Co., 109 S. Ct. at 752 (quoting Fullilove v. Klutznick, 448 U.S. 448, 518-19 (1980)).

73. Martin v. Wilks, 109 S. Ct. 2180 (1989).

74. United States v. Jefferson County, 28 Fair Empl. Prac. Cas. (BNA) 1834 (N.D. Ala. 1981).

against them. The district court denied injunctive relief.[75] The Eleventh Circuit affirmed the denial of intervention and the denial of injunctive relief, both on the basis that the white firefighters could file a Title VII action asserting specific violations under the consent decrees.[76]

A third group of non-minority plaintiffs then brought suit against the city, alleging denials of promotions because of their race. The city admitted making race-conscious hiring and promotion decisions pursuant to the consent decrees but moved to dismiss the complaint as an impermissible collateral attack[77] on the earlier decrees. The district court granted the motion to dismiss.[78]

The Eleventh Circuit reversed, holding that the plaintiffs' claims were not precluded because they had not been parties to the litigation which resulted in the consent decrees. The court recognized the "strong public policy in favor of voluntary affirmative action plans"[79] which had caused most other circuits to preclude collateral attack by non-parties to consent decrees.[80] However, the Eleventh Circuit found the due process interests of non-minority employees to outweigh the public policy interest in equal employment opportunity. The Supreme Court granted certiorari.[81]

In an opinion which opened thousands of consent decrees to collateral attack by non-minority employees, the Supreme Court affirmed the Eleventh Circuit. The facts of *Martin* present a relatively compelling due process claim favoring the non-minority employees, as they or their privies in interest had attempted during the initial litigation and immediately thereafter to present their case as parties, and had been denied that opportunity. The holding of *Martin*, however, is not limited to cases in which non-minority employees have been so vigilant or have been denied a prior opportunity to assert their claims in a timely manner. Chief Justice Rehnquist wrote the opinion, joined by Justices White, O'Connor, Scalia and Kennedy. The majority recognized that a non-party may intervene pursuant to Rule 24, or may be involuntarily joined pursuant to Rule 19. However, since Rule 24 intervention is permissive, the failure to intervene may not be given preclusive effect.[82]

The fallout from *Martin* could be enormous. Of the hundreds of thousands of operative voluntary affirmative action plans affecting mil-

75. *Martin*, 109 S. Ct. at 2181.

76. United States v. Jefferson County, 720 F.2d 1511, 1518, 1520 (11th Cir. 1983).

77. Collateral attack on a judgment is permissible only if the court had no jurisdiction over the subject matter, or if the judgment is the product of corruption, duress, fraud, collusion, or mistake. *See* Restatement (Second) of Judgments §§ 69-72 (1982); Griffith v. Bank of New York, 147 F.2d 899, 901 (2d Cir. 1945), *cert. denied*, 325 U.S. 874 (1945).

78. *Martin*, 109 S. Ct. at 2181.

79. In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1498 (11th Cir. 1987).

80. *See, e.g.*, Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), *cert. denied*, 464 U.S. 900 (1983); Dennison v. City of Los Angeles, 658 F.2d 694 (9th Cir. 1981); EEOC v. McCall Printing Corp., 633 F.2d 1232 (6th Cir. 1980).

81. Martin v. Wilks, 108 S. Ct. 2843 (1988).

82. *Martin*, 109 S. Ct. at 2182.

lions of employees,[83] a significant percentage are either consent decrees or judicially imposed decrees. All of these decrees are now in some degree of jeopardy. Since the factual basis for most collateral attacks on decrees would be current employment decisions taken pursuant to the decrees, there would seem to be no applicable statute of limitations which would protect the decrees. The limitations period for both a fourteenth amendment claim and a Title VII claim would commence with the specific employment decision being challenged, and not upon the entry of the decree.[84] Thus, for those many decrees entered without formal party participation of non-plaintiff employees, any currently aggrieved employee can now challenge the decree.

For those decrees resulting from litigation in which non-plaintiff employees participated as parties, the degree of vulnerability will depend largely on whether the district and circuit courts are willing to find sufficient identity of interest between the employee parties and the currently aggrieved employee.[85] For instance, a current plaintiff claiming sex discrimination would not necessarily have sufficient identity of interest with white male intervening employees in the original Title VII action.

The uncertain status of all existing decrees poses an awkward problem, not only for women and minority employees whose employment rights are rendered dubious, but also for employers who are faced with potential monetary liability whether they comply with or defy the standing court orders. Indeed, the employer's position is rendered all the more precarious by the fact that cases, long since resolved, may now be relitigated before new judges appointed during the Reagan years.

3. *Independent Federation of Flight Attendants v. Zipes* (attorneys' fees against intervenors)

Following quickly on the heels of *Martin*, the Court's decision in *Independent Fed'n of Flight Attendants v. Zipes*[86] further opened the door for challenges to existing and proposed remedial decrees. In 1970, a group of female flight attendants brought suit against Trans World Airlines ("TWA"), challenging its policy of terminating the employment of flight attendants who became pregnant. One month after suit was filed TWA abandoned its policy of pregnancy-based discharges, and shortly thereafter, the parties reached a settlement agreement which included an award of competitive[87] seniority for the class members.

83. Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524, 525 (1987).

84. *See* In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1498 (1987). *Compare* Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261 (1989), discussed *infra* p. 40.

85. *See Birmingham*, 833 F.2d at 1498.

86. 109 S. Ct. 2732 (1989).

87. "Competitive seniority" refers to seniority used to award scarce benefits to competing employees. "Noncompetitive seniority" or "benefit seniority" refers to seniority used to award employment benefits which are available to all employees without competition. Franks v. Bowman Transp. Co., 424 U.S. 747, 766 (1976).

At this point, Independent Federation of Flight Attendants ("IFFA") was granted leave to intervene to oppose the award of competitive seniority to the plaintiffs. IFFA argued that the district court lacked jurisdiction to award relief to time-barred class members and that the award of competitive seniority would violate the collective-bargaining agreement between IFFA and TWA. The district court rejected IFFA's arguments and the Seventh Circuit affirmed.[88] The Supreme Court granted certiorari and affirmed the district and circuit courts on both issues.[89]

Plaintiffs then successfully petitioned the district court for an award of attorneys' fees against IFFA under 42 U.S.C. § 2000e-5(k). The more than twelve years of litigation, including five appeals, had virtually all resulted from the objections of the intervenors and their predecessors in interest, as TWA had ceased its challenged practice almost immediately after suit was filed. The district court held that "unsuccessful Title VII union intervenors are, like unsuccessful Title VII defendants, consistently held responsible for attorneys' fees."[90] The Seventh Circuit affirmed,[91] and the Supreme Court granted certiorari[92] and reversed.[93]

Title VII's attorneys' fee provision, 42 U.S.C. § 1988, provides for a discretionary award of attorneys' fees to the prevailing party.[94] In *Albemarle Paper Co. v. Moody*,[95] the Court had ruled that a Title VII prevailing plaintiff is to be awarded attorneys' fees against an unsuccessful employer in all but special circumstances. In *Christiansburg Garment Co. v. EEOC*,[96] the Court ruled that a prevailing defendant is to be awarded attorneys' fees only when the plaintiff's action was frivolous, unreasonable or without foundation.[97] The distinction between the two standards was based upon the strong policy in favor of enabling plaintiffs to bring Title VII suits, the plaintiff's status as a private attorney general and the unsuccessful defendant's status as a violator of federal law.[98] The Supreme Court had never ruled on the standard to be applied to fee awards against intervenors; however, the district and circuit court authority almost uniformly supported fee awards against intervenors using the same basis as awards against defendants.[99]

88. Air Line Stewards and Stewardesses Ass'n Local 550 v. Trans World Airlines, Inc., 630 F.2d 1164 (7th Cir. 1980).

89. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

90. Air Line Stewards and Stewardesses Ass'n Local 550, TWU, AFL-CIO v. Trans World Airlines, Inc., 640 F. Supp. 861, 867 (N.D. Ill. 1986).

91. Zipes v. Trans World Airlines, Inc., 846 F.2d 434 (7th Cir. 1988).

92. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 835 (1989).

93. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

94. 42 U.S.C. § 2000e-5(k) (1982).

95. 422 U.S. 405 (1975).

96. 434 U.S. 412 (1978).

97. *Id.* at 415-421.

98. *Id.* at 418-419.

99. *See, e.g.*, Morten v. Bricklayers, Masons and Plasterers, 543 F.2d 224 (D.C. Cir. 1976); Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979); Allen v. Terminal Transp. Co., 486 F. Supp. 1195 (N.D. Ga. 1980), *aff'd sub nom.* United States v. Terminal Transp. Co., 653 F.2d 1016 (5th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); Van Hoomissen v. Xerox Corp., 503 F.2d 1131 (9th Cir. 1974); Akron Center for Reproductive Health v. City

Justice Scalia delivered the opinion in *Zipes*, writing for a five Justice majority.[100] The Court held that attorneys' fees may be awarded against intervenors in Title VII litigation only upon a finding that the intervenors' action was frivolous, unreasonable, or without foundation.[101] The Court's reasoning focused almost entirely upon the "innocent" status of an intervenor defending its "rights," even if unsuccessfully, and referred to intervenors as "particularly welcome since we have stressed the necessity of protecting, in Title VII litigation, 'the legitimate expectations of . . . employees innocent of any wrongdoing,' *Teamsters v. United States*, 431 U.S. 324, 372 (1977)."[102]

Justice Scalia reasoned that the Court's ruling in *Martin v. Wilks*[103] effectively required the stricter standard for fee awards against intervenors. Under *Martin*, employees objecting to a Title VII remedy may either intervene prior to judgment or may collaterally attack the remedy after judgment. In a collateral attack, the objecting employees would be Title VII plaintiffs, presumptively shielded from a fee award upon losing, and presumptively entitled to a fee award upon winning. If, as intervenors, unsuccessful objecting employees were presumptively liable for fees, Justice Scalia reasoned that objecting employees would be more likely to opt for post-judgment collateral attack.[104]

This reasoning heightens the impact of both *Martin* and *Zipes*. Absent *Zipes*, it would be far from clear that *Martin* plaintiffs attacking Title VII decrees would be entitled to the same favored treatment which *Albemarle Paper Co.* and *Christiansburg Garment Co.* had afforded to plaintiffs seeking to further the goals of Title VII. This holding invites third-party challenges to Title VII claims with the same incentives heretofore offered to invite the assertion of such claims, reflecting a major shift in public policy not supported by the legislative history of the statute. The *Zipes* fee standard is therefore framed so as to remove any disincentive to non-minority employees' prompt defense against minority claims. Nor was the Court willing to limit its holding to fees incurred to defend the remedy, as opposed to fees incurred to defend against arguments as to liability. The *Zipes* majority held that either sort of argument, made by an intervenor, is made for the purpose of defending its own employment rights, and that such a purpose is "entitled to no less respect than

of Akron, 604 F. Supp. 1268 (N.D. Ohio, 1984); Thompson v. Sawyer, 586 F. Supp. 635 (D.D.C. 1984), *aff'd on other grounds*, 678 F.2d 257 (D.C. Cir. 1982); Vulcan Soc'y of Westchester County v. Fire Dep't, 533 F. Supp. 1054 (S.D.N.Y. 1982). *Cf.* Charles v. Daley, 846 F.2d 1057 (7th Cir. 1988); Robideau v. O'Brien, 525 F. Supp. 878 (E.D. Mich. 1981).

100. Chief Justice Rehnquist and Justices White, O'Connor, Kennedy and Scalia constituted the majority. Justices Blackmun, Marshall and Brennan dissented. Justice Stevens took no part in the case.

101. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

102. *Id.* at 2735.

103. Objecting employees may still be inclined to choose collateral attack, since as successful Title VII plaintiffs, they would be presumptively entitled to a fee award from the employer defendant. Thus Justice Scalia's reasoning actually supports Justice Blackmun's concurring opinion which would hold that the adjudicated Title VII violator, the employer, should bear the plaintiff's attorneys' fees expended against the intervenors.

104. *Zipes*, 109 S. Ct. at 2736-38.

the rights asserted by [a Title VII plaintiff]."[105]

Martin and *Zipes* are a powerful duo. Together they declare open season on thousands of existing remedial decrees, and on all future remedial decrees. The Court has issued a clear invitation to non-minority employees to challenge claims made by minority litigants—claims, which were heretofore resisted principally by employer defendants. Indeed, the door is wide open to collusive arrangements whereby the employer may substantially delegate the defense of its case to non-minority employee intervenors, thus all but nullifying § 1988.

B. *Seniority Systems*

1. *Lorance v. AT&T Technologies, Inc.* (statute of limitations for Title VI claim)

While it may be open season on remedial decrees, the season is essentially closed on bona fide seniority systems. In *Lorance v. AT&T Technologies, Inc.*,[106] a decision issued on the same day as *Martin*, the Court limited a Title VII plaintiff's opportunity to attack intentional[107] discrimination in a seniority system to a 180/300 day[108] period immediately following the system's enactment, whether or not the system has yet harmed any minority employee.

Prior to 1979, AT&T's seniority system computed a worker's competitive seniority[109] based upon years of plantwide service. No change in seniority occurred upon promotion to the more skilled and better paid "tester" position. Tester positions had almost exclusively been held by men, and nontester positions had been held predominantly by women.

In the mid-1970's, women began to exercise their seniority rights to qualify as testers. In 1979, AT&T and Local 1942, International Brotherhood of Electrical Workers, AFL-CIO entered into a collective bargaining agreement which changed the manner of calculating tester seniority. For a tester with less than five years in a tester's position, the new system calculated seniority based only on years as a tester, and discounted completely years in other plant positions. Testers with more than five years in a tester position (mostly men) could regain full plantwide seniority by completing a training program.[110]

During 1982 an economic downturn necessitated demotions, which

105. *Id.* at 2738.

106. 109 S. Ct. 2261 (1989).

107. In a challenge to a seniority system, intentional discrimination is the only vehicle open to a Title VII plaintiff. 42 U.S.C. § 2000e-2(h). For a potential disparate impact challenge, the statute already gives conclusive deference to the expectations of non-minority workers, no matter how disparate the *effect* of the seniority system upon minorities.

108. 42 U.S.C. § 2000e-5(e) requires a Title VII charge to be filed with the EEOC within 180 days of the occurrence of the challenged action. If the complainant has first instituted proceedings in a 706 deferral (state or local) agency, this limitations period is extended to 300 days.

109. *See Lorance*, 109 S. Ct. at 2263 n.1.

110. *Id.* at 2261.

were accomplished by seniority ranking. The *Lorance* plaintiffs, women who had become testers between 1978 and 1980, were demoted, though they had greater plantwide seniority than men who were retained as testers. They promptly filed administrative charges and then filed suit, alleging that the 1979 alteration of the seniority calculation formula was the product of a conspiracy between the company and the union to protect incumbent male testers and to discourage women from seeking the traditionally male tester jobs.[111] AT&T sought summary judgment, arguing that the statute of limitations began to run upon adoption of the seniority system in 1979, and that it had expired by at least 300 days after the adoption of the system. The plaintiffs argued that the continued use of a seniority system is an ongoing violation of Title VII if the system is designed, operated and maintained with the intent to discriminate.[112]

The district court staked a middle ground. The court refused to completely insulate an intentionally discriminatory seniority system after its first 180/300 days, but also refused to permit a plaintiff to wait to challenge the system until it had actually operated to her detriment. The court held that the limitations period begins to run for each employee at the time that employee becomes subject to the discriminatory system.[113] Therefore, while the *Lorance* plaintiffs' claims were time barred, there would be a continuous supply of possible plaintiffs as new employees were hired.[114] The Seventh Circuit affirmed the district court, and the Supreme Court granted *certiorari*[115] to decide the statute of limitations issue.[116]

Justice Scalia, who authored the *Martin* opinion, also wrote for the *Lorance* majority. The Court held that the limitations period commenced upon the adoption of the system,[117] and thus completely protected intentionally discriminatory seniority systems more than 300 days old. The Court's ruling was based upon a theoretical construct focusing on the date of the "intent" required by § 703(h), and upon seniority as a present contract right (albeit a right to favorable treatment in a future situation which might or might not arise). Justice Scalia wrote:

Under the collective bargaining agreements in effect prior to

111. *Id.*

112. Lorance v. AT&T Technologies, Inc., 827 F.2d 163, 165 (7th Cir. 1987).

113. *Id.* at 166 (emphasis added).

114. *Id.* at 167.

115. Lorance v. AT&T Technologies, Inc., 109 S. Ct. 217 (1988).

116. The majority of circuits had embraced the "continuing violation" theory advocated by the *Lorance* plaintiffs. *See, e.g.*, Patterson v. American Tobacco Co., 634 F.2d 744, 750-51 (4th Cir. 1980) (continued application of unlawful seniority system constitutes "continuing violation," hence not time barred by failure to challenge system at inception); Cook v. Pan American World Airways, Inc., 771 F.2d 635, 646 (2d Cir. 1985) (maintenance of discriminatory seniority system constitutes continuing violation of ADEA); Morelock v. NCR Corp., 586 F.2d 1096, 1103 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979) ("continuing violation" of ADEA); *but cf.* Bronze Shields, Inc. v. N.J. Dep't. of Civil Serv., 667 F.2d 1074, 1077 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982) (discussion of precedent and commentary regarding "continuing violation" theory).

117. Lorance v. AT&T Technologies, Inc., 109 S. Ct. 2261, 2264 (1989).

> 1979, each petitioner had earned the right to receive a favorable position in the hierarchy of seniority among testers (if and when she became a tester), and respondents eliminated those rights for reasons alleged to be discriminatory. Because this diminution in employment status occurred in 1979 [petitioner's claims are time-barred].[118]

Thus, under the *Lorance* holding, testers hired more than 300 days after the adoption of the discriminatory system would never have a right to challenge it. Nor would current testers who were unaware of the offending provision in the new system, with the possible exception of those who could demonstrate that their employer acted affirmatively to conceal the discriminatory provision. Further, it is unclear whether other plant employees who, at the time the seniority system was adopted, aspired to become testers would have standing to challenge the discriminatory system. While the logical extension of Justice Scalia's language would seem to support standing, it is doubtful that this Court would be particularly receptive to a challenge to an entire seniority system based merely upon a plaintiff's argument that she may one day wish to become a tester.[119]

However, even if the Court adopts an expansive notion of standing to challenge seniority systems, the actual effect of *Lorance* will be essentially the same. For most plaintiffs, the risks and practical considerations inherent in filing suit against a current employer outweigh all but the most sure and serious harm. Few are the employees who will be willing to challenge a system which has not yet, and may never, cause them any harm. Fewer still are the attorneys who would undertake such a case, promising no back pay award, especially since the case may be defended by intervenors protecting their seniority claims so that the chance of a substantial attorneys' fee award is diminished.[120]

Perhaps most striking, though, is the juxtaposition of *Lorance* and *Martin*. Under *Lorance*, victims of *intentional* discrimination, accomplished by a unilateral and perhaps undisclosed act on the part of their employer, must immediately file a charge or lose their right to challenge the discrimination. This is so whether or not they are yet harmed and indeed whether or not they are even aware of the discriminatory act. Under *Martin*, white men who wish to oppose remedial relief for victims of adjudicated prior discrimination may, at any time, challenge a judgment, despite the fact that it was entered only after direct notice to them, and after contested hearings covering all aspects of the proposed decree. Under *Lorance*, minorities and women hired after an intentionally discriminatory seniority system is 300 days old must rely on those who were employed during the first 300 days to protect their rights, whether or not those earlier employees were or would be harmed by the

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118. *Id.* at 2263-64.

119. C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE 2D § 3531 (1984).

120. *See* Martin v. Wilks, 109 S. Ct. 2180 (1989).

seniority system. Under *Martin*, white males are expressly not required to rely on earlier employees to protect their rights.

Admittedly the issues raised by claims barred by a statute of limitations (particularly in the context of seniority systems on which other employees have relied for years) and claims based on collateral attack of a systemic equitable decree are set in different doctrinal contexts and there are some differing policy considerations. However, the overriding concern for the due process rights of non-minority employees in *Martin* is notably not reflected in a corresponding concern for the due process rights of women and minorities in *Lorance*. A minority employee may rely on an operative Title VII decree as surely as a non-minority may rely on an intentionally discriminatory seniority system. The interest in prompt resolution of claims is present in both cases. Yet the Court has elected to shield intentionally discriminatory seniority systems after 180 days, but exposes public judicial decrees to attack at any time. Again this reflects a major shift in public policy. The implementation of Title VII's original goals is curtailed, while the statute is turned against itself to dismantle its own decrees.

2. *Public Employees Retirement System of Ohio v. Betts* (application of the exception for seniority systems in ADEA claims)

Public Employees Retirement System of Ohio v. Betts[121] is another limitation on challenges to seniority systems. *Betts* involved non-competitive or benefit seniority in the context of an age discrimination claim.

The Age Discrimination in Employment Act of 1967 ("ADEA") proscribes employment discrimination based upon age. Section 4(a)(2) forbids an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."[122] However, the ADEA provides an exception for employment actions taken pursuant to the terms of "any bona fide employee benefit plan, which is not a subterfuge to evade the purposes of" the Act.[123] The issue in *Betts* is the scope of this exception.

The Public Employees Retirement System of Ohio ("PERS") was established in 1933. PERS provides retirement and disability plans for employees of the State of Ohio. An employee may only receive benefits from one of these plans, and in 1959, PERS was amended to provide that employees who are sixty and over may not receive benefits under the disability plan. In 1967, the ADEA was enacted and in 1974 it became applicable to state governments. In 1976, PERS was amended to include a minimum benefit amount payable under the disability plan, but not under the retirement plan.

121. 109 S. Ct. 2854 (1989).
122. 29 U.S.C. § 623(a)(1) (1982).
123. 29 U.S.C. § 623(f)(2) (1982).

June Betts had been an employee of the State of Ohio since 1978. Prior to 1985, she developed medical problems which continued to worsen until, in 1985, her supervisor determined that Betts was no longer physically able to perform her job. Betts was given the option to retire under the PERS retirement plan, but she was not eligible to receive disability benefits because she was sixty-one years old. Because the minimum benefit award applied only to the disability plan, Betts' monthly check was less than half of the amount which would have been paid under the disability plan.

Betts brought suit against PERS, alleging a violation of the ADEA. The district court found the PERS scheme to be discriminatory on its face. At issue then was the scope of the exception for bona fide benefit plans. The district court, relying on the EEOC interpretive regulation that the exception applied only if any reductions in employee benefits are justifiable by cost considerations, found that the exception did not apply to the PERS provision.[124] The PERS provision was not justified by increased cost and thus not covered by the exemption. The court of appeals affirmed the district court's decision,[125] and the Supreme Court noted probable jurisdiction.[126]

The majority opinion, written by Justice Kennedy, reaffirmed the Court's earlier holding in *United Air Lines v. McMann*[127] that no pre-ADEA action can be a subterfuge.[128] The Court then focused on the scope of the exception as it applied to post-ADEA employment actions, and specifically to the 1976 PERS amendment providing a minimum payment for disability benefits.

The Court held that the EEOC's construction of the word "subterfuge" was contrary to the plain meaning of the ADEA, and thus that it was entitled to no weight.[129] The Court then proceeded through a complex and sometimes convoluted exercise in statutory analysis, and ultimately concluded that a benefit plan is a "subterfuge" only if it is a method of discriminating in other, "nonfringe-benefit aspect[s] of the employment relation[ship]."

Additionally, the Court held that the "subterfuge" exception is not an affirmative defense but is instead a part of the ADEA plaintiff's *prima facie* case. Further, the plaintiff must prove actual intent on the part of the employer in order to negate the application of the exception.[130]

The Court's holding that a pre-ADEA employment action cannot be regarded as a subterfuge is correct. However, the construction of the

124. Betts v. Hamilton County Bd. of Mental Retardation, 631 F. Supp. 1198 (S.D. Ohio 1986).

125. Betts v. Hamilton County Bd. of Mental Retardation & Development Disabilities, 848 F.2d 692 (6th Cir. 1988).

126. Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 256 (1988).

127. 434 U.S. 192 (1977).

128. Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 2854, 2861 (1989).

129. *Id.* at 2862-65.

130. *Id.* at 2865-68.

scope of the exception to exclude only those benefit plans which are a method of discriminating in other aspects of the employment relationship is, as Justice Marshall pointed out, an immunization of "virtually all employee benefit programs from liability" under the ADEA.[131] The scope of the exception now protects even plans devised expressly for the purpose of discriminating against older workers, and even if the reason for the discrimination is the employer's hostility to or stereotypes of older workers.

The conversion of the affirmative defense into an element of the plaintiff's *prima facie* case and the requirement of proof of actual intent will have limited practical impact, since most benefit plans will not affect non-benefit employment actions covered by ADEA. However, even in those cases where non-benefit actions are proven to be affected by the benefit plan, it will be very difficult for the employee to prove as part of its *prima facie* case that the employer intended such a secondary discriminatory impact. The most a plaintiff will usually be able to show is that the employer operated from mixed motives. In that context, plaintiffs may draw some comfort from the *Price Waterhouse* ruling that, at least in the Title VII context, a plaintiff's showing that the employer was influenced by an impermissible motive, as well as by legitimate motives, shifts to the defendant the burden of proving that it would have committed the same act absent the impermissible motive. However, in the ADEA fringe benefit context, it may prove difficult for plaintiffs to capitalize on the *Price Waterhouse* rationale. To the extent that the courts will apply the reasoning of *Price Waterhouse* in such cases, it seems to follow that the employer need only show that it deliberately sought to discriminate against protected employees in the benefit package, and would have done so even absent secondary discriminatory effects. There is no need to justify or even claim a non-discriminatory business reason.

Betts is another expansion of the rights of employers, another burden placed upon plaintiffs, another category of employment decisions placed beyond the reach of equal employment opportunity. The EEOC interpretation of the bona fide employee benefit plan exception, heretofore accepted by the courts, construed the statute to accommodate legitimate business interests of the employer, that is, cost considerations. The holding in *Betts* shields deliberate discrimination without regard to any such legitimate need of the employer.

C. *Section 1981.* Patterson v. McLean Credit Union *(applicability of the Civil Rights Act of 1866 to private contracts)*

In 1976, *Runyan v. McCrary*[132] held that the Reconstruction Enforcement Act, 42 U.S.C. § 1981,[133] prohibits racial discrimination in

131. *Id.* at 2869.

132. 427 U.S. 160 (1976).

133. 42 U.S.C. § 1981 (1982) provides as follows:

All persons within the jurisdiction of the United States shall have the same right in

the making and enforcement of private contracts.[134] In *Runyan*, two black children had been denied admission to private schools expressly because of their race. They filed suit, alleging that § 1981 prohibited such racially discriminatory admissions policies. The Supreme Court agreed, holding that the school's refusal to contract with the plaintiffs based upon their race was a "classic violation of § 1981."[135]

In 1987, in *Patterson v. McLean Credit Union*, the Supreme Court granted *certiorari* to determine whether § 1981 applies to a claim of racial harassment in employment.[136] After oral argument, the Court shocked courtwatchers and civil rights activists by setting *Patterson* over to the next Term and requesting the parties to brief and argue the question of whether the *Runyan* holding should be reconsidered.[137]

Patterson, a black woman, was employed by McLean Credit Union from 1972 to 1982. She testified at trial that during her employment she was given more work than white employees, subjected to racial slurs, assigned more demeaning tasks than white employees, denied training opportunities available to white employees, not notified of promotion opportunities, passed over for the promotion opportunities she sought, paid less than white employees, and singled out for scrutiny and public criticism. She alleged that her selection for layoff was also based upon her race. After the 1982 layoff, she filed suit, alleging that these actions by the credit union had violated her civil rights under 42 U.S.C. § 1981.[138] Both the district court and the Fourth Circuit held that § 1981 applied to her claims for failure to promote and discriminatory discharge, but that § 1981 did not apply to her claims for racial harassment.[139] Other circuits had held that § 1981 reaches claims of maintenance of a hostile working environment and private racial harassment.[140]

The Supreme Court opinion was handed down at the end of the 1989 term. The Court declined to overturn *Runyan* though Justice Kennedy, writing for the majority, did not conceal the reluctance of the subscribing Justices in letting *Runyan* stand.[141] The decision is based almost entirely on the "fundamental importance" of the doctrine of *stare*

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every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens . . . .

134. *See also* Johnson v. Railway Express Agency, 421 U.S. 454, 459-460 (1975); Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 439-440 (1973); *cf.* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-443 n.78 (1968).

135. *Runyan*, 427 U.S. at 172.

136. Patterson v. McClean Credit Union, 484 U.S. 814 (1987). The Court also granted certiorari to review the jury instruction on the § 1981 promotion claim. *See* Section D. *infra*.

137. Patterson v. McClean Credit Union, 485 U.S. 617 (1988).

138. Patterson also alleged intentional infliction of emotional distress under North Carolina tort law. Patterson did not bring a Title VII claim, presumably because the limitations period had expired. 805 F.2d 1143, 1144 (4th Cir. 1986).

139. Patterson v. McClean Credit Union, 805 F.2d 1143 (4th Cir. 1986).

140. *E.g.*, Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1256, 1255, 1256-1259 (6th Cir. 1985), *cert. denied* 475 U.S. 1015 (1986); Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1981).

141. Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2369 (1989).

decisis to the preservation of a judicial system not based upon arbitrary discretion.[142]

However, the majority emphatically precluded any broad reading of § 1981's scope. The Court adopted the narrowest possible reading of the "making" and the "enforcement" of contracts. According to *Patterson*, the "making" of a contract covers only the contract's formation, but not subsequent problems arising from the conditions of continuing employment; "enforcement" of contracts covers only the right of access to a legal process to resolve contract claims.[143] Under this strict construction, Patterson's claims of racial harassment, including the failure to train, and the failure to give wage increases, were not actionable under § 1981.

Though the credit union had not argued that § 1981 did not reach claims for failure to promote, the Court held that promotion claims are actionable under § 1981 only where the promotion "rises to the level of an opportunity for a new and distinct relation between the employee and the employer."[144] The Court cautioned lower courts not to "strain in an undue manner the language of § 1981" in making this determination,[145] but rather to adopt the same sort of narrow reading used in the *Patterson* analysis.

What is the real significance of *Patterson*?[146] It is true that all of Patterson's claims not reached by § 1981 are covered by Title VII. Indeed, Title VII's scope is more comprehensive and broader than § 1981.[147] There are, however, some differences between the two statutes which make § 1981 more helpful to a civil rights plaintiff. Title VII's 180/300 day statute of limitations[148] is substantially shorter than the customary two or three year statute of limitations applicable to § 1981 claims.[149] Section 1981 requires no complex administrative procedures prior to suit, as does Title VII.[150] Section 1981 reaches conduct by any person, while Title VII covers only employers of fifteen or more

142. *Id.* at 2370.

143. *Id.* at 2772-73.

144. *Id.* at 2377.

145. *Id.*

146. Some commentators argue that the greatest import of *Patterson* may prove to be in the context of private associational and contractual relationships other than employment claims. *See* L. MODJESKA, EMPLOYMENT DISCRIMINATION LAW 328-29 (2d ed. 1988).

147. For instance, § 1981 prohibits only racial and certain ethnic discrimination, while Title VII proscribes private discrimination based on race, color, religion, sex or national origin. *See* Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987). Section 1981 prohibits only purposeful discrimination, while Title VII proscribes both disparate treatment and disparage impact. *See* Gen. Bldg. Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982); *See also*, Sections D and E *infra*.

148. *See supra* note 6.

149. The statute of limitations governing a § 1981 claim corresponds with the state statute of limitations governing personal injury. Goodman v. Lukens Steel Co., 482 U.S. 656, 660-62 (1987). In Owens v. Okura, 109 S. Ct. 573 (1989), the Court held that, in states with multiple personal injury limitations periods, the applicable provision, at least for the purposes of § 1983, is the limitations period for general or residual personal injury claims.

150. 42 U.S.C. § 2000e-5(b), (e), (f)(1) (1982).

persons, labor organizations, and certain conduct by employment agencies.[151] Section 1981 plaintiffs are entitled to a jury trial, while Title VII claims are tried to the court. Successful § 1981 plaintiffs may recover broad equitable and legal relief, sometimes including punitive damages, while Title VII relief is limited to back pay and affirmative job relief. *Patterson* has cut off these § 1981 advantages from all but plaintiffs alleging discrimination in hiring.[152] It is only the larger significance of some of the other recent cases and the fact that the Court reluctantly reaffirmed *Runyan* which makes *Patterson* seem to pale by comparison.

On the one hand, *Patterson* reflects the real incongruity of leaving the same employment relationships subject to both § 1981 and Title VII, as § 1981 tends to undermine Title VII's statutory, administrative, and equitable structure, allowing plaintiffs to circumvent the reasonable protections afforded to employers. Such protections are the necessary prerequisite to the aggressive equitable relief necessary to achieve the goals of the Civil Rights Act of 1964. On the other hand, the narrow reading of § 1981 arbitrarily focuses on the inception of the employment relationship while allowing rampant discrimination in the ongoing dynamic of that relationship. This focus disregards the legislative intent and the public policy underlying § 1981. A far more coherent approach to civil rights in the employment context could have been achieved if the Court had found an implied partial repeal of § 1981 so as to exclude from its coverage employment relationships governed by Title VII but otherwise left § 1981's scope intact.

D. *Disparate Treatment* — Price Waterhouse v. Hopkins *(standard of causation)*

The most commonly used proof model for a Title VII claim of intentional discrimination is the disparate treatment model. First articulated in *McDonnell Douglas Corp. v. Green*,[153] the disparate treatment model requires the plaintiff to present a *prima facie* case which disproves the most common legitimate causes for the employer's action, thus raising an inference of discrimination.[154] In a hiring context, for instance, in order to establish a *prima facie* case, the plaintiff need only prove:

> (i) that he belongs to a [protected group]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[155]

151. 42 U.S.C. § 2000e (1982). Fifteen percent of employees are not covered by Title VII. Carver, *Employment Practices*, Lab. L. Rep. (CCH) No. 364, at 6 (July 17, 1989).

152. Under *Patterson* some claims of failure to promote *may* be considered as claims of discrimination in hiring. *See supra*, p. 51.

153. 411 U.S. 792 (1973).

154. Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); International Bd. of Teamsters v. United States, 431 U.S. 324 (1977).

155. *McDonnell Douglas*, 411 U.S. at 802.

In the second stage of proof, the defendant may rebut the inference of discrimination simply by articulating some legitimate, nondiscriminatory reason for the challenged employment decision.[156]

In the third and final stage of the *McDonnell Douglas* model, the plaintiff must prove, by a preponderance of the evidence, that the employer's articulated reason was a mere "pretext" for discrimination.[157] In other words, the plaintiff must prove that the defendant's true motive was based upon the plaintiff's membership in a protected group. But what if the defendant's true motive was based partly upon plaintiff's race or sex and partly upon the articulated legitimate, nondiscriminatory reason? The Supreme Court answered this question in another 1989 case, *Price Waterhouse v. Hopkins*.[158]

Price Waterhouse is a nationwide professional accounting firm. Partnership decisions are made through a series of steps beginning when the partners in a local office submit the name of one of their senior managers as a candidate for partnership. All partners in the firm then have the opportunity to comment on the candidate. The firm's admissions committee reviews the comments and recommends to the policy board that the candidate be accepted, rejected or placed on hold. The policy board decides whether to submit the candidate's name to the entire partnership for a vote, to reject the candidate, or to place her on hold. The comments by partners, and the decisions of the admissions committee and the policy board are completely discretionary, employing no guidelines or fixed criteria.[159]

In 1982, Ann Hopkins had been employed at Price Waterhouse's Office of Government Services in Washington, D.C. for five years. Her performance had been excellent. As a senior manager she had successfully procured major contracts for the partnership and she was respected and liked by her clients. The partners in her office praised her skills and proposed her as a candidate for partnership that year. Only seven of the 662 partners in the firm were women. Of the eighty-eight candidates for partnership that year, Hopkins was the only woman. However, the partners in her office and others who commented on her candidacy also offered criticism, primarily centered on her lack of interpersonal skills in dealing with staff members and her "masculine" behavior. Partners commented that she was "macho," "overcompensated for being a woman," "needed" a course at charm school, used unladylike language, and was too aggressive.[160]

At the conclusion of the candidacy process, the policy board decided to put Hopkin's candidacy on hold, and advised her to walk, talk and dress "more femininely, . . . wear make-up, have her hair styled, and wear jewelry."[161] Subsequently, the partners in her local office refused

156. *Id.* at 807.
157. *Id.*
158. 109 S. Ct. 1775 (1989).
159. *Id.* at 1781.
160. *Id.* at 1782.
161. *Id.*

to repropose her for partnership, resulting in constructive discharge.[162] Hopkins filed a Title VII suit against Price Waterhouse alleging discrimination in the partnership decision. Price Waterhouse articulated Hopkins' lack of interpersonal skills as the legitimate reason for her rejection and argued that, even if impermissible sex stereotyping did taint the candidacy process, the firm's legitimate reasons would have resulted in the same decision.

The district court found that Price Waterhouse had violated Title VII by giving credence to sexual stereotypes. On the issue of remedies, the court held that Price Waterhouse could avoid equitable relief by proving by clear and convincing evidence that it would have made the same decision absent the discrimination. The trial court ruled that Price Waterhouse had not carried this "heavy burden."[163]

The United States Court of Appeals for the District of Columbia Circuit affirmed, but used a different analysis. The appeals court considered the mixed motive issue as part of the liability phase of the litigation, holding that an employer could avoid a finding of a Title VII violation by proving that legitimate reasons alone would have resulted in the same decision. The circuit court agreed that the appropriate proof standard for this "affirmative defense" was clear and convincing evidence. The Supreme Court found the circuits in disarray on the effect of mixed motives in a Title VII case,[164] and granted *certiorari* in *Price Waterhouse*.[165]

Justice Brennan wrote the Court's opinion. He was joined by Justices Marshall, Blackmun and Stevens, with concurring opinions by Justices White and O'Connor. The Court accepted the proposition that an employer should not be held liable for violating Title VII if the employer would have made the same decision absent discriminatory motives. However, the Court rejected Price Waterhouse's argument that the words "because of" mean "but-for causation," thus rejecting the next step of that rationale: that "but-for causation" was part of a plaintiff's burden of proof.[166]

Instead, the Court held that the causation language of Title VII, ". . . to discrimination . . . *because of* . . . such individual's . . . sex,"[167] simply means that the discriminatory reason was a "motivating factor" in the employment decision. The Court held that "but-for causation" was an affirmative defense, based upon Title VII's policy of preserving the employer's decision-making autonomy in areas not proscribed by the statute. Thus, the burden of proving "but-for causation," as an affirmative defense, rests upon the employer.[168] The Brennan opinion does not regard the creation of this affirmative defense as a change in

162. *See id.* at 1781 n.1.
163. *Id.* at 1783.
164. The holdings of the 11 circuits which had considered the effect of mixed motives in Title VII cases reflect five different approaches to the issue. *Id.* at 1784 n.2.
165. Price Waterhouse v. Hopkins, 108 S. Ct. 1106 (1988).
166. *Price Waterhouse*, 109 S. Ct. at 1784-86.
167. 42 U.S.C. § 2000e-2(a)(1), (2) (1982) (emphasis added).
168. *Price Waterhouse*, 109 S. Ct. at 1786-90.

the *McDonald Douglas* framework, since the result is conceptualized as an affirmative defense rather than a partial shifting of the burden of proof.[169]

As for the standard of proof required, the Court saw no reason to depart from the conventional rule of proof by a preponderance of the evidence. However, the Court offered some guidance in applying the preponderance standard. Justice Brennan wrote that in most cases the employer will be expected to include objective evidence as to the probable decision absent discrimination.[170] The standard requires the employer to prove what it *would have done*, as opposed to what it would have been justified in doing.[171]

The O'Connor concurrence differs conceptually from the Brennan opinion. Borrowing from tort analysis, Justice O'Connor employed an evidentiary shifting of the burden, based on proof by plaintiff sufficient to create an inference of causation. This conceptual difference allows her to justify arguing for a limitation upon the holding. She wrote that a plaintiff must show "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion" in order to shift to the defendant the burden of proof on "but-for" causation.[172]

Justice White saw little point in this conceptual debate, though he himself utilized language of a shifting burden rather than an affirmative defense. He did not view the holding as a departure from *McDonnell Douglas*, but instead a refinement recognizing the difference between mixed motive cases and pretext cases. The three Justice dissent entered the conceptual debate, arguing that the Brennan opinion's definition of "because of" strips the phrase of all causal significance. Characterizing the issue as one of burden shifting, Justice Kennedy argued that there is no compelling reason to shift the burden, and that the increased complexity of the disparate treatment proof model will make the shifting burden unworkable.[173]

A word of caution regarding the dissent's characterization of the holding is in order. The primary opinion, Justice Brennan writing for a plurality, clearly held that a plaintiff need only prove that a protected characteristic "played a motivating part in an employment decision" in order to require a defendant to prove that "it would have made the same decision even if it had not taken the plaintiff's [protected characteristic]

169. *Patterson*, handed down just six weeks after *Price Waterhouse*, reaffirms the *McDonnell Douglas* proof model, albeit in a § 1981 case. Patterson v. McClean Credit Union, 109 S. Ct. 2363, 2377-78 (1989). *See supra* Section C.

170. This holding [may be] a plurality position, as Justice White's concurrence specifically disagrees that there should be any special requirement of objective evidence by the employer, *Price Waterhouse*, 109 S. Ct. at 1795-96, and Justice O'Connor's concurrence does not set out her position on this issue. Justice Kennedy's dissent mischaracterizes the court's holding. *Id.* at 1806.

171. *Price Waterhouse*, 109 S. Ct. at 1787-88 (emphasis added).

172. *Id.* at 1805. Again, Justice Kennedy mischaracterizes Justice O'Connor's position as to the Court's holding. *Id.* at 1806-14.

173. *Price Waterhouse*, 109 S. Ct. at 1806-14.

into account."[174] Only Justice O'Connor's concurrence would require the plaintiff to prove, by "direct evidence," that the protected characteristic was a "substantial factor" in the decision in order to trigger the defendant's burden to prove "but-for" causation.[175]

Justice White's concurrence adopts the *Mt. Healthy* standard, which uses "motivating factor" and "substantial factor" interchangeably. His opinion does not require "direct evidence" from either party, and requires the defendant to prove that the employment action would have been taken anyway.[176]

Combining the plurality and the two concurrences, the Court's holding is as follows: A plaintiff need only prove that a protected characteristic played a substantial part or in other words, that it was a motivating factor in the employment decision. Upon such proof, which need not be of any special variety, the defendant must then prove that it would have made the same decision, even absent the discriminatory reason.

However, the dissent characterizes the Court's holding differently. Justice Kennedy writes that the Court held that "in a limited number of cases," where a plaintiff presents "direct and substantial evidence," the burden of proof shifts to the defendant to prove that the "decision would have been supported by legitimate reasons."[177]

None of the controlling *Price Waterhouse* opinions require the defendant to prove merely that the decision would have been supported by legitimate reasons. Rather, they require that the employer would have made the same decision.[178] Further, Justice White's concurrence, the key fifth vote, uses "motivating factor" and "substantial factor" interchangeably, adopting the *Mt. Healthy* language, and none of the opinions in the combined majority mention "substantial *evidence*" (as opposed to "a substantial factor"). The dissent seems to have been reading a different set of opinions than those ultimately issued.

The majority's holding on the causation issue is clearly a middle road. *Price Waterhouse* required the Court to decide (1) what causation standard is required; (2) whether the analysis operates in the liability or the damages phase of the case; (3) who bears the burden of proof; and (4) by what standard of evidence causation must be proven. The Court chose the pro-employer "but-for causation" standard, placed the analysis in the liability phase of the litigation (a pro-employer decision), placed the burden of proof on the defendant (a pro-employee decision), but chose the lower "preponderance" standard (a pro-employer decision). Although *Price Waterhouse* may be regarded as a strengthening of the disparate treatment model, in a pro-employee sense, closer analysis reveals the decision to be a delicate refinement and balancing of the

174. *Id.* at 1795.
175. *Id.* at 1798.
176. *Id.* at 1795.
177. *Id.* at 1806.
178. *See Id.* at 1788.

evidentiary burdens of the parties. The result is not so much a more pro-employee model as a more viable model in that each party is effectively required to produce the evidence reasonably available to that party in a coherent order.

Another aspect of *Price Waterhouse* is worthy of comment. The opinion removes any doubt about the legitimacy of a Title VII claim alleging sex stereotyping.[179] Justice Brennan wrote:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming *or insisting* that they matched the stereotype associated with their group, for "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[180]

Further, *Price Waterhouse* legitimates not only expert proof of sex stereotyping in the form of testimony by social psychologists,[181] but also "lay" proof. Justice Brennan wrote:

> It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor, . . . does it require expertise in psychology to know that, if any employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.[182]

E. *Disparate Impact.* Wards Cove Packing Co., Inc. v. Atonio *(statistical proof and re-articulation of impact proof model)*

The Supreme Court articulated the disparate impact proof model primarily in *Griggs v. Duke Power Co.*[183] and *Albemarle Paper Co. v. Moody*.[184] While the individual disparate treatment model can be effective in proving discrimination against a relatively unsophisticated employer whose articulated motives are illicit, it fails to address the more subtle but equally invidious discrimination which results from "artificial, arbitrary, and unnecessary barriers"[185] "to full employment."[186] These barriers, though facially neutral, are discriminatory in effect. In order to

179. However, Justice Kennedy cautioned that the sex stereotyping still must have a causal result in order to violate the statute. *Id.* at 1807.

180. *Id.* at 1791, citing to Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978), quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (emphasis added).

181. While the Brennan opinion has no difficulty with expert testimony of sex stereotyping, at least where the employer's challenge is untimely, Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1793 (1989), Justice O'Connor cautions that such testimony "standing alone" would not constitute the "direct evidence" of "substantial reliance" which she would require in order to shift the burden on causation. *Id.* at 1793.

182. *Id.* at 1793.

183. 401 U.S. 424 (1971).

184. 422 U.S. 405 (1975).

185. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

186. Holdeman, *Watson v. Fort Worth Bank and Trust: The Changing Face of Disparate Impact*, 66 DEN. U.L. REV. 179, 181 (1989).

address such facially neutral employment practices in the Title VII context, the disparate impact proof model was adopted following fourteenth amendment precedents.[187] The next thirteen years saw further refinements in the application of the proof model,[188] but no retreat from the basic principles of its operation. A disparate impact plaintiff had to demonstrate that a particular employment device had a statistically adverse impact upon a protected group in marked disproportion to its impact on employees outside that group.[189] After the plaintiff established this *prima facie* case, the burden of persuasion (not merely the burden of production) shifted to the defendant to establish the business necessity or manifest job relatedness of the challenged employment practice.[190]

If the defendant proved the business necessity of the employment practice, the plaintiff was required to demonstrate the existence of other reasonable alternatives which would have less adverse impact on the protected group.[191]

In 1988, in *Watson v. Fort Worth Bank & Trust*,[192] a unanimous Court extended disparate impact analysis to subjective employment decision-making. Disparate impact was clearly applicable to objective procedures such as manual dexterity test and to objective criteria such as height, education, or strength; but the circuits were divided as to whether disparate impact analysis could be applied in cases of subjectively measured criteria such as professionalism, leadership, and congeniality, or cases of subjective procedures such as interviews or evaluations, or cases in which employment decisions were made arbitrarily without fixed criteria or procedures. *Watson* brought such cases under the umbrella of the disparate impact proof model. However, the newly forming conservative wing of the Court, in a plurality opinion, re-articulated this proof model in terms which raised serious doubt about the continuing vitality of the *Griggs/Albemarle* formulation.[193] In the 1989 case of *Wards Cove Packing Co., Inc. v. Atonio*,[194] the *Watson* plurality was joined by Justice Kennedy, enabling a new majority to restructure the disparate impact proof model, dramatically increasing the difficulty of proving a disparate impact claim.

187. *See* Lau v. Nichols, 414 U.S. 563 (1974); Perkins v. Matthews, 400 U.S. 379 (1971); Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir., 1977).

188. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977).

189. *Griggs*, 401 U.S. at 424.

190. *Griggs*, 401 U.S. at 432; Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

191. *Griggs*, 401 U.S. at 424.

192. 108 S. Ct. 2777 (1988). Until *Watson*, the circuits had been divided as to whether disparate impact analysis was applicable to subjective employment decision-making.

193. Holdeman, *Watson v. Fort Worth Bank and Trust: The Changing Face of Disparate Impact*, 66 DEN. U.L. REV. 179 (1989).

194. 109 S. Ct. 2115 (1989).

1. Facts

A group of former employees brought a class action suit against Wards Cove Packing Co. Inc. and Castle and Cooke Inc., owners and operators of a number of Alaska salmon canneries and fish camps. The complaint alleged that Wards Cove Packing Co. and Castle and Cooke had discriminated on the basis of race in hiring, firing, paying, promoting, housing and messing (providing food) at their Alaska canneries.

Salmon canning is a seasonal enterprise coinciding with the summer salmon run. Most of the canneries are located in remote areas of Alaska, and consequently the canning companies transport most employees to the canneries, feed and house them there, and transport them from the canneries when their work is completed.

There are two general categories of jobs: cannery worker-labor jobs and non-cannery jobs. The non-cannery employees are hired in the Seattle area in the early spring and are sent to the canneries in preseason (late April or May) to dewinterize, repair and prepare the facilities for the salmon run. They also stay after the canning season ends to winterize and shut down the facilities.

Non-cannery jobs include carpenters, machinists and other skilled trades, but also include some unskilled positions. At the canneries operated by the defendants, these employees are mostly white, and they are paid from two to three times as much as cannery workers. Most non-cannery jobs are filled by word-of-mouth recruitment. The mostly white supervisors have virtually complete discretion in making hiring decisions. There is no advertising or posting of job openings. Rehire preference is given to former non-cannery employees, but not to cannery employees, for non-cannery jobs. Many non-cannery employees are related to other non-cannery employees.

Cannery employees are hired later in the spring and are employed only during the season, which lasts from three weeks to two months. Most are hired either from Alaska Native villages or through a largely Filipino local of the International Longshoremen's and Warehousemen's Union ("ILWU Local 37"). Most cannery workers are non-white, largely of Filipino, Alaska Native, Japanese or Chinese descent. Rehire preference is given to cannery employees for cannery jobs, and many cannery employees are related to other cannery employees.

Non-cannery workers arrive at the cannery sites approximately one month earlier and stay one month later than the cannery workers. They are assigned to the smaller, nicer and better insulated bunk houses. As the cannery workers arrive, the remaining large bunkhouses are opened and the cannery workers are housed there. Since almost all non-cannery workers are white, housing is almost entirely racially separate. Bunk houses are often identified by racial labels such as the "Eskimo quarters" or "the Filipino house."

Each cannery has two mess halls, one identifiably white and the other identifiably non-white. The union contract with Local 37 provides

for a separate cooking crew for Local 37 workers. The mess halls are often designated as "the Filipino mess house" and "the White mess house."

Other racial labeling is also common. The salmon butchering machine is called the "chink" and the operator is "the chink man." Cannery workers are referred to as "Eskimo labor" or "the Filipino crew"; cannery worker sign-on pay as "Filipino sign-on pay"; certain employee badge numbers are reserved for "Filipinos" and others for "Natives"; laundry bags and mail slots are marked with designations like "Oriental Bunkhouse."

The plaintiffs alleged that all of the these employment practices discriminate on the basis of race in violation of Title VII. The complaint alleges that 1) the employers intentionally discriminated (the disparate treatment proof model), and that 2) even if there was no intent to discriminate, these employment practices nonetheless had an adverse impact on minorities and were not necessary to the employer's business (the disparate impact proof model).

The trial court entered judgment in favor of the employers on several grounds, including a holding that the disparate impact proof model is not applicable to subjective employment practices.[195]

The employees appealed to the U.S. Court of Appeals for the Ninth Circuit, which ultimately reversed the trial court's decision. The full court held that disparate impact analysis should have been applied to all of the challenged employment practices.[196] In a second opinion, the court remanded the case to the trial court with instructions as to how the disparate impact analysis should apply.[197] The employers appealed to the Supreme Court, which granted *certiorari* to hear the case.

While the plaintiffs claimed discrimination in pay, promotion, housing and messing, these disparities stemmed directly from the fact that most employees hired for non-cannery jobs were white and most hired for cannery jobs were minorities. At the heart of the case, then, is the claim that the defendants' hiring practices had a disparate effect on minorities.

2. Statistics

The statistical component of a disparate impact case is the vehicle for proving the degree of impact caused by the employer's practice.[198]

195. Atonio v. Wards Cove Packing Co., 34 Empl. Prac. Dec. (CCH) 33,821 (W.D. Wa. 1982).

196. Wards Cove Packing Co., Inc. v. Atonio, 810 F.2d 1477.

197. Wards Cove Packing Co., Inc. v. Atonio, 827 F.2d 439.

198. In order to establish a *prima facie* case, the disparity of impact must be substantial. The Uniform Guidelines on Employee Selection Procedures provide a suggested benchmark of eighty percent. A selection rate for any race, sex, or ethnic group which is less than 4/5 of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of disparate impact. 29 C.F.R. § 1607.4 (1988). While the "80% rule" is not a strict formula for determining disparate impact, it is a benchmark of prosecutorial discretion, Clady v. County of Los Angeles, 770 F.2d 1421 (9th Cir. 1985); and, as part of the Uniform Guidelines, is entitled to great deference by

In other words, the purpose of the statistical comparison is to isolate and measure the effect of the employer's practice from the effect of all other possible causes for the imbalance. Thus, the preferred statistical comparison is between the racial composition of employees in at-issue jobs and the racial composition of the qualified relevant labor market.[199] For most at-issue jobs, this comparison effectively eliminates other possible causes for the impact, such as a dearth of qualified applicants.

If there are no barriers or practices deterring qualified minorities from applying for at-issue jobs, a court may properly compare the racial composition of those hired with those who applied.[200] If such statistics are difficult or impossible to obtain, or if barriers have skewed the applicant flow, other reasonably reliable statistical comparisons (a surrogate pool) may also be probative.[201]

In *Wards Cove*, plaintiffs offered neither applicant flow statistics nor labor market statistics. Instead plaintiffs rested their statistical case almost entirely upon an internal comparison of the employer's work force. Simply put, plaintiffs demonstrated that most of the cannery workers were minorities and that most of the non-cannery workers were white, and argued that the packing companies' hiring and promotion policies either caused or perpetuated this racial stratification in the work force without a business justification.

Presumably, the *Wards Cove* plaintiffs were unable to gather either relevant labor market statistics or applicant flow statistics. Though the *Wards Cove* opinions and trial record did not shed light on the plaintiffs' trial strategies, one may surmise that applicant flow statistics were unavailable because of the highly informal, geographically segmented, and substantially undocumented hiring procedure used by the employers. Even if plaintiffs could have gathered statistics measuring expressions of job interest, such statistics could not measure the effects of challenged employment practices such as failure to post job openings, separate and geographically diverse hiring channels, and the chilling effect on potential applicants of the existing racial stratification in the workforce.[202] These factors would operate to skew the applicant flow.

Relevant labor market statistics would seem to have been more fea-

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the courts. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). Statistical comparisons must be valid in terms of significance (based on a sample large enough to yield reliable results), Kim v. Commandant, Defense Language Institute, 772 F.2d 521 (9th Cir. 1985); Soria v. Ozinga Bros. Inc., 704 F.2d 990 (7th Cir. 1983); Harper v. Trans World Airlines, Inc., 525 F.2d 409 (8th Cir. 1975); scope (covering the appropriate category of employees), Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 482 (9th Cir. 1983); Kirkland v. New York State Dept. of Correctional Services, 520 F.2d 420 (2nd Cir. 1975); and time (covering appropriate length of time), Capaci v. Katz & Besthoff, 720 F.2d 1291 (5th Cir. 1983); Roman v. ESB, Inc., 550 F.2d 1343 (4th Cir. 1976); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.4, 1607.15 A(2) (1988).

199. Hazelwood School Dist. v. United States, 433 U.S. 299, 308 (1977).

200. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2119, 2120-21 (1989); *See* Teamsters v. United States, 431 U.S. 324, 365 (1977).

201. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977) (allowing use of national general population statistics).

202. *See Teamsters*, 431 U.S. at 365-66.

sible to obtain than applicant flow statistics, but undoubtedly there would be significant difficulties there, too. The skills required for the at-issue jobs were diverse, ranging from medical personnel to machinists and from carpenters to clerical workers.[203] The relevant labor market included the entire northwestern United States rather than one geographically restricted area within normal commuting distance, as would be customary for jobs not requiring residence at the job site. Perhaps most importantly, the relevant labor market would include only those willing to undertake a seasonal position requiring several months away from home, living in primitive conditions.

Presumably because of these difficulties, plaintiffs used what was, in effect, a surrogate pool. That is, they used the pool of cannery workers as a surrogate for the pool of qualified applicants or the relevant labor market.

Not surprisingly and not unreasonably, the Court rejected the plaintiffs' statistical comparison. Writing for the majority, Justice White observed that a racially imbalanced workforce, without more, does not constitute a violation of Title VII, nor does it constitute evidence of a statutory violation. Absent improper limitation on the applicant flow, such statistics, according to the majority, are "irrelevant to the question of a *prima facie* statistical case of disparate impact." To hold otherwise, observed Justice White, "would almost inexorably lead to the use of numerical quotas in the workplace . . . ."[204]

The majority found a number of problems with the use of these workforce statistics. First, most of the at-issue jobs (non-cannery jobs) were skilled positions. Non-cannery positions included such jobs as carpenters, machinists of several varieties, crane operators, institutional cooks, pipe fitters, clerical workers, medical personnel, and radio operators. The plaintiffs failed to show that any significant percentage of the cannery workers possessed any of these skills. Without evidence establishing that cannery workers were qualified for non-cannery jobs, the plaintiffs' statistics cannot separate the effect of the hiring procedure from the effect of a lack of qualified minorities.[205] Thus, with regard to the skilled non-cannery positions, the workforce statistics failed to establish a pool of qualified applicants.

Second, for skilled and unskilled positions alike, the majority found additional flaws in the use of cannery workers as a surrogate pool. Justice White wrote that the use of cannery workers was an analysis "at once both too broad and too narrow in its focus." Since plaintiffs had made no showing of how many cannery workers would seek non-cannery positions, he found the pool too broad. Since the district court had found that non-whites were overrepresented in cannery positions, as compared with the relevant labor market, he found the pool too

203. Atonio v. Wards Cove Packing Co., 34 Empl. Prac. Dec. (CCH) 33,821, 33,833-33,835 (W.D. Wa. 1982).

204. *Wards Cove*, 109 S. Ct. at 2123.

205. *Id.*

narrow.[206]

The dissenting Justices did little to effectively attack the majority's statistical approach. Agreeing that the ideal statistical analysis should compare the racial composition of at-issue jobs with the racial composition of the relevant labor market, Justice Stevens argued that the district court had made insufficient findings regarding the nature of the relevant labor market, especially for non-cannery jobs, that the court had made no findings regarding the extent to which cannery workers possessed non-cannery job skills, despite "persuasive" testimony, from individual plaintiffs; and that the labor market statistics offered by the employers were deficient in that they did not identify workers willing to accept seasonal work. The dissent implies agreement with the majority that racial stratification of the workforce does not establish a *prima facie* case, but argues that the stratification should be treated as significant evidence in a *prima facie* case.[207]

Conceptually, the majority is correct. If the purpose of statistical proof is to isolate and measure the effect of a challenged employment practice, an internal analysis of the employer's workforce, without more, measures little. Only in the unusual employment setting of totally internal hiring would such workforce statistics measure the effects of the hiring procedure, and then only if virtually all lower level employees were both qualified for and desirous of the at-issue jobs.

The Court was therefore correct in finding the statistical analysis presented by the *Wards Cove* plaintiffs to be insufficient to establish a *prima facie* case. This is not to say, however, that the Court's articulation of standards for statistical proof is entirely satisfactory. Despite the almost self-evident fact that hiring processes such as those used in *Wards Cove* have a disparate impact by perpetuating racial stratification in the work force, the degree of precision of statistical analysis required by the Court may well have placed these practices beyond attack, at least in the "unique" case[208] of intense, seasonal employment. A plaintiff cannot rely on applicant statistics because the very hiring practices challenged prevent the gathering of accurate applicant statistics by both deterring potential non-white applicants and by failing to document job inquiries. A plaintiff will be hard pressed to rely on qualified labor market statistics because the skills required for upper tier jobs are too diverse to tailor the pool, and because it is often difficult to identify and exclude those unwilling to accept seasonal employment away from home.

The only remaining option is the use of a surrogate pool, and the most obvious possibility for use as a surrogate is the employer's own lower level work force. The *Wards Cove* decision would allow a plaintiff to use work force statistics, in such a case, provided that the plaintiff carefully tailor that pool to reflect only workers qualified for upper level jobs. However, the majority went on to impose unrealistically strict evi-

206. *Id.*
207. *Id.* at 2127.
208. *Id.* (Stevens, J., dissenting).

dentiary standards, requiring direct proof of even the most obvious components of the analysis. For instance, in *Wards Cove*, non-cannery positions often paid three to four times as much as cannery positions for a season only about a month longer.[209] Non-cannery positions entitled the employee to heated bunkhouses, and more comfortable accommodations. Yet the majority was unwilling to infer that most cannery workers would prefer non-cannery jobs, objecting instead that the plaintiffs had not proven how many cannery workers would seek non-cannery jobs absent the challenged practices.

The majority's objection to the plaintiffs' evidence on this point is another occasion upon which the Court has implicitly rejected normal circumstantial evidence and instead required direct evidence. By applying a requirement of direct evidence *sub silentio*, the majority is able to avoid the necessity of justifying its rejection of standard evidentiary principles. In 1989, we are clearly a long way from the time (1976) when a nearly unanimous Court held that:

> Measured against these standards, the company's assertion that a person who has not actually applied for a job can never be awarded seniority relief cannot prevail. The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices — by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.[210]

Finally, the majority's strict statistical proof requirements are problematic because here, as often, the quality of statistical evidence available to the disparate impact plaintiff is almost entirely within the control of the employer. The more informal, subjective, and undocumented the employment procedure, the less likely the plaintiff will be able to compile the statistics necessary to challenge the discriminatory effect of the

209. *See* Plaintiff's Brief at 5.
210. Teamsters v. United States, 431 U.S. 324, 365-66 (1977).

employer's arbitrary practices. The problem is obvious. The proof requirements encourage the very conduct which is so often a cloak for impermissible discrimination. The majority discounts this problem by pointing out that employers subject to the Uniform Guidelines on Employee Selection Procedures[211] ("Guidelines") are required to maintain records sufficient to calculate the impact of employment practices.[212] Yet seasonal employers like the *Wards Cove* defendants are exempted from the Guidelines' recordkeeping requirements.[213] Even for covered employers, the recordkeeping requirements carry no meaningful sanctions and are notoriously unenforced. In the face of the obvious incentives to keep incomplete records, the Court's citation to the Guidelines is little more than a convenient choice to avoid having to justify the results of the evidentiary standards now imposed.

3. Identification

After discussing the issue of statistical proof, the majority went on to clarify other parts of the impact proof model left uncertain by last term's plurality decision in *Watson*.[214] Under the pre-*Watson* proof model, a plaintiff was required to demonstrate that the challenged employment practice had a disparate impact on a protected group. Implicit in this *prima facie* case was a requirement that the plaintiff identify the offending employment practice. However, the degree of specificity required for such identification had never been directly addressed by the Court, and the degree of specificity can easily be outcome determinative.

Consider a multi-component hiring procedure which combines a degree requirement, a check of references, a preference for three years of relevant experience, and an interview. The interviews are conducted by a single decision-maker who subjectively assesses the applicant using a list of criteria such as ability to relate well with others, communication skills, appearance, leadership skills and attitude. After completing the process, the decision-maker makes an intuitive decision from among the applicants with the required degree, based upon the responses of references, the interview, and the nature of the applicant's prior experience. This procedure results in almost exclusively hiring of white males to the virtual exclusion of other people. How specifically must a plaintiff identify the offending practice or employment qualification in order to successfully challenge this hiring procedure? A plaintiff would be able to assess the impact of the degree requirement. Since it operates essentially as a screening device, its impact will be clearly traceable. This is precisely the kind of identification requirement which the Supreme Court has implicitly applied in its earlier disparate impact decisions. For instance, in *Griggs v. Duke Power Co.*,[215] the challenged practice was a

211. 29 CFR § 1607.1 (1988).
212. *See* 29 CFR § 1607.4(A) and (C).
213. 29 CFR § 1602.14(b) (1988).
214. 108 S. Ct. 2777 (1988). *See* Holdeman, *Watson v. Fort Worth Bank & Trust, The Changing Face of Disparate Impact*, 66 DEN. U. L. REV. 179 (1989).
215. 401 U.S. 424 (1971).

requirement of a high school degree or a passing test score. In *Albemarle Paper Co. v. Moody*,[216] the challenged practice was a pre-employment test. In *Dothard v. Rawlinson*,[217] the challenged practice was a height and weight requirement. In *New York Transit Authority v. Beazer*,[218] the challenged practice was the automatic exclusion of all applicants who were methadone users. In *Connecticut v. Teal*,[219] the challenged practice was a pre-promotion screening examination.

But identification becomes a thornier issue when a plaintiff challenges the impact of either subjective *criteria* used for employee selection, or subjective *procedures* (methods) for employee selection. In *Wards Cove*, the plaintiffs had challenged several objective employment practices (word-of-mouth hiring, separate hiring channels, nepotism, re-hire preferences) and the practice of subjective decision-making. The Court held that, in such a case, the plaintiff must:

> . . . demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.[220]

The dissenting Justices address this identification requirement only briefly, by pointing out that traditional tort causation concepts do not require that the offending act be the sole or even the primary cause of the harm.[221] The import of the identification holding is potentially enormous. The majority opinion may well be read (as the dissent understood it) to require the *Wards Cove* plaintiffs not only to measure the combined impact of the challenged practices — a task difficult enough — but to separate the impact of each component from the others. Apparently, the only characteristics of an employment procedure which may be successfully challenged are those which, operating in a vacuum, would have an individual impact level sufficiently egregious to establish disparate impact.

It is anomalous indeed that an employer may not significantly impact a protected group by using a single-component employment device, but that same employer may permissibly accomplish an even greater adverse impact against a protected group by combining the impact of several components. The majority does not even attempt to justify this result, either conceptually or practically.

Further, the evidentiary difficulties of such a task are staggering for the plaintiff. Rare will be the employment practice for which the statistical effect of each component can be isolated and separately measured. Even a personnel specialist with strong incentives would find it a chal-

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216. 422 U.S. 405 (1975).
217. 433 U.S. 321 (1977).
218. 440 U.S. 568 (1979).
219. 457 U.S. 440 (1982).
220. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2125 (1989).
221. *Id.* at 2132, *citing to* RESTATEMENT (SECOND) OF TORTS §§ 430-33 (1965) and Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989).

lenging task to create a procedure with individual components, each of which would have a separately measurable impact level after the components had been used in combination and simultaneously. However, the *Wards Cove* holding gives employers every incentive to select systems which do not document or memorialize the discrete impact of each aspect of the decision-making process.[222] Certainly a prophylactic policy of not keeping records will be far easier than using quotas and therefore, a far more real danger.[223] This is particularly true since quotas would buy protection from disparate impact challenges only at a high price — significant loss of employer autonomy — whereas use of untrackable systems will maximize the kind of employer autonomy which has often served as a mask for discrimination.

There will be other battlegrounds in addition to the proof problems, perhaps the largest of which will be semantic. The Court has never defined the various terms often used interchangeably to refer to employment actions challengeable by impact analysis: employment practices, devices, procedures, components, systems, criteria. The *Wards Cove* requirement speaks primarily in terms of specific employment "practices".[224] It is not difficult to imagine the semantic battles which will accompany the identification requirement, as plaintiffs identify a certain employment "practice" and defendants seek to divide the employment action into a group of "practices."

The *Wards Cove* majority seeks to justify the requirement of isolating each component "practice" by reliance on *Connecticut v. Teal*,[225] but the Court misremembers the theoretical underpinnings of the *Teal* holding. In *Teal*, the defendant had used a pre-promotion screening test which had a disparate impact upon minorities. The defendant had compensated for the disparate impact of the test by manipulating the second step of the promotion process. The *Teal* holding focused upon the rights of individual applicants for promotion. The Court held that to allow a second stage in the selection process to cure the disparate impact of the first stage "ignores the fact that Title VII guarantees [the applicants at the first stage] the opportunity to compete equally with white workers. . . ."[226]

The *Teal* rationale does not support the proposition that employment actions must be analyzed in subcategories. Indeed, the *Teal* emphasis on individual applicants would support the opposite result. Under *Teal*, the key is equality of opportunity, at each stage of the deci-

222. In fact, it has been cogently argued that *Wards Cove* not only negates the employers need to validate their employment criteria but actually discourages them from doing so as such validation procedures could only serve to build the case against the employer. C. Craver, *Employment Practices*, 364 Lab. L. Rep. (CCH) 4 (July 17, 1989).

223. *See*, Holdeman, *Watson v. Fort Worth Bank & Trust, The Changing Face of Disparate Impact*, 66 DEN U.L. REV. 179, 190-192 (1989).

224. 109 S. Ct. at 2127.

225. 457 U.S. at 450.

226. *Id.* at 451.

sion-making process. It by no means legitimates multi-component systems which work cumulatively to deny such equality of opportunity.

4. Business Justification

Once a plaintiff had established that the challenged practice had a disparate impact, the pre-*Watson* proof model required the employer to shoulder the burden of persuasion (not merely production) to establish that the challenged practice was a business necessity or manifestly job related.[227] The *Watson* plurality raised doubt as to whether the Court intended to maintain this burden allocation.[228]

In one paragraph, the *Wards Cove* majority dispenses with the requirement that the employer shoulder the burden of proof on business justification. Justice White made no attempt to justify the break with precedent. He pointed out that plaintiffs generally bear the burden of proof, citing Federal Rules of Evidence, Rule 301, and that disparate treatment plaintiffs bear burden of proof at each stage. Then he wrote:

> We acknowledge that some of our earlier decisions can be read as suggesting otherwise . . . . But to the extent that those cases speak of an employer's "burden of proof" with respect to a legitimate business justification defense, . . . they should have been understood to mean an employer's production — but not persuasion — burden.[229]

In the same section the majority significantly lowered the level of business need necessary to justify the use of an employment practice with a disparate impact. The Court did not justify the change, nor even admit that its holding constituted a break with precedent. Dispensing with the requirement that the challenged practice be justified by "manifest job relatedness" or "business necessity," Justice White wrote:

> Though we have phrased the query differently in different cases, it is generally well-established that at the justification stage of a disparate impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.[230]

Justice White framed the inquiry as a middle ground between a "mere insubstantial justification" and an "indispensable" practice. The dissenting Justices pointed out the new standard, Justice Stevens writing, "I am astonished to read" the majority's "casual — almost summary — rejection of the statutory construction that developed in the wake of *Griggs*. . . ."[231]

Certainly the shifting of the burden of proof on justification back to the plaintiff, and the simultaneous increase in the standard to be proven will have a significant effect. Even if shifting the burden of proof only

227. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
228. *See* Holdeman, *supra* note 221, at 194-196.
229. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989).
230. *Id.* at 2125.
231. *Id.* at 2131.

makes a difference in close cases, that difference is significant.[232] But that is not the only significance. The pre-*Watson* allocation was useful, not only in that it placed the burden of proof on the party who had the ability to gather and maintain the evidence, but also because it was consonant with the public policy of eradicating racial and sexual stratification in employment. If such a policy is a national priority, then once it has been established that an employment practice has a discriminatory effect, it is reasonable to require the employer to prove that the practice is justified. The former rule also relieved plaintiffs of the rather awkward task of proving a negative, i.e., that the practice is not justified.

5. Alternative Practices

Finally, the majority discussed the third stage of the impact proof model. In stage three, an employment practice which has a disparate impact, but which is sufficiently justified, may still be unlawful if "other [practices] without a similarly undesirable racial effect would also serve the employer's legitimate interest."[233]

After quoting the well-worn language from *Albemarle*, Justice White rather casually added that:

> [o]f course, any alternative practices which respondents offer up in this respect must be *equally effective* as petitioners' chosen hiring procedures in achieving petitioners' legitimate employment goals. Moreover, "[f]actors such as the *cost or other burdens* of proposed alternative selection devices are relevant in determining whether they would be *equally as effective as the challenged practice* in serving the employer's legitimate business goals." Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988) (O'Connor, J.). "*Courts are generally less competent than employers* to restructure business practices," Furnco Construction Corp. v. Waters, 438 U.S. 567, 578 (1978); consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice . . . ."[234]

This articulation of stage three is small comfort to a plaintiff who has met the Court's strict standards for statistical evidence and specific identification in stage one, but who has failed to prove the lack of business justification in stage two. A stage three plaintiff must prove (1) that the alternative device would have had less adverse impact, and (2) that it would have served the employer equally well.

Proof of the impact level of the alternative device often will be impossible. Assessment of the impact of a device actually used is difficult enough. Proof of the impact level of a hypothetical device will be even more difficult. Even if a plaintiff can establish that the impact level of

232. *See* Justice Kennedy's concurring opinion in Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1800 (1989).

233. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

234. Wards Cove Packing Co. v. Antonio, 109 S. Ct. 2115, 2127 (1989) (emphasis added).

the alternative device would be substantially less disparate, the requirement that the proposed device must serve the employer equally well will often be impossible. This is particularly true since Justice White's language seems to almost create a presumption in favor of the employer who is more "competent" in these matters.

The effect of the majority's interpretation of stage three is to elevate the most trivial business interest of the employer above the plaintiff's and society's interests in equal employment opportunity. This shifting of the weight afforded to these competing socio-economic interests belies any claim that equal employment opportunity is still a strong or even a viable public policy.

III. THE NEW GENERATION — REAGAN'S LEGACY.

There are two major ideological principles at work in the 1989 term. First, the opinions clearly signal a shift in the balance between the interests of disadvantaged groups, employers, and advantaged groups.

With Title VII's enactment, Congress declared that the eradication of employment discrimination was to be considered a national policy of the highest priority.[235] In the first quarter century the Court gave meaning to that declaration by its willingness to place a judicial thumb on the scales in favor of disadvantaged groups, when doing so would encourage or assist Title VII plaintiffs to fulfill their role as private attorneys general.

The very creation of the two primary proof models are examples. The disparate impact proof model, freeing the plaintiff from the tether of intent,[236] was a major step.[237] The disparate treatment proof model, though still requiring proof of intent, eased the burden by requiring the employer to first articulate its non-discriminatory reasons.[238] The adoption of a presumptive fee award to prevailing plaintiffs[239] but not to prevailing defendants[240] is another example of the Court's recognition of the social policy.

Title VII's second quarter century, however, sees a Court unwilling

235. *See* S. REP. No. 872, 88th Cong., 2d Sess., pt. 1, at 11, 24 (1964); H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963); H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 2, at 1-2 (1963).

236. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

237. Some argue that it was a step far beyond Title VII and the congressional intent which enacted it. *See* Gold, *"Grigg's An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition and a Recommendation for Reform,"* 7 INDUS. REL. L.J. 429 (1985).

238. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). *But see* Furnish, *"Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Disparate Treatment Cases Under Title VII,"* 6 INDUS. REL. L.J. 353 (1984).

239. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968) (a prevailing plaintiff should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust").

240. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (fee award to prevailing defendant only upon showing "that the plaintiff's action was frivolous, unreasonable, or without foundation").

to tip the balance of competing interests in favor of women and minorities; willing instead to elevate the interests of employers and advantaged employees at the expense of plaintiffs' interests.

Perhaps the most dramatic shift is the elevation of the interests of advantaged groups. *City of Richmond's*[241] adoption of strict scrutiny review for voluntary state and local government affirmative action by state and local government renders such governmental initiatives all but a dead letter, and the future of all affirmative action is shrouded.

The implicit conceptual underpinnings of this holding reveal a dramatic reversal of national policy. Strict scrutiny was historically applied to racial classifications which disadvantage minorities primarily because of the magnitude of the damage done by slavery and by the powerful vestiges of slavery which have operated to deprive minority citizens of full participation in American society. Racial classification was subjected to strict scrutiny because it was historically invidious, unjust, and oppressive — a tool to perpetuate the legacy of slavery. The decision to apply strict scrutiny to remedial racial classification implicitly regards the past twenty-five years of affirmative action as similarly invidious and effectively equates the efforts of states to achieve racial equality with Jim Crow laws.

The theme is continued in *Martin v. Wilks*. The majority opinion agreed that identification of persons appropriate for joinder will be difficult for plaintiffs, but responded that those difficulties "arise from the nature of the relief sought."[242] The majority expressly intended that affirmative relief be difficult to secure.

The *Martin* dissent by Justice Stevens points out that the majority mischaracterized the holding of the lower court, and therefore sidestepped the real issue of whether a court ordered plan is a defense to a subsequent claim of intentional discrimination. Justice Stevens pointed out that the district court did not hold that the white fire fighters were bound by the prior decree, but rather that race-conscious promotions made because they are required by a court order are not made with the requisite discriminatory intent.[243] The majority simply conceptualized the question in a way which insured the answer it desired.

Even if this sleight-of-hand was not an intentional device, the consequences of the *Martin* holding cannot have evaded the Court. In the face of the contrary holdings of the great majority of the federal courts of appeals,[244] the majority opened to attack thousands of decrees entered during the past twenty-five years. The gravity of this action is manifest.[245] Nor can it realistically be considered a coincidence that

241. City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989).
242. Martin v. Wilks, 109 S. Ct. 2187 (1989).
243. *Martin*, 109 S. Ct. at 2193 n.15.
244. *Id.* at 2185 n.3.
245. The *Martin* holding also comes at the expense of employers' significant interests in avoiding re-litigation of remedial decrees, particularly given the inevitable uncertainty as to what evidence would be relevant and what the proof standards would be when relitigating a remedy imposed years before.

Martin was issued together with *Lorance v. AT&T*,[246] in which the Court protected from challenge all facially neutral seniority systems more than 180 days old, no matter how seriously they impact individuals who have no other opportunity to challenge the discriminatory system. While there are policy reasons for treating seniority systems differently from other Title VII violations,[247] the juxtaposition of these two opinions remains a none too subtle clue to this Court's agenda.

However, if there were any doubt, the elevation of the interests of nonminority employees is explicitly set out by Justice Scalia in *Zipes*.[248] He wrote:

> While innocent interveners raising non-Title VII claims are not, like Title VII plaintiffs, "the chosen instrument[s] of congress," [citation omitted] neither are they disfavored participants in Title VII proceedings. An intervenor of the sort before us here is *particularly welcome*, since we have stressed the necessity of protecting, in Title VII litigation, "the legitimate expectations . . . of employees innocent of any wrongdoing,"[249]

In the footnote referencing this assertion, Justice Scalia directly pinpointed the difference between the two approaches. He observed that the dissent had favored the interests of prevailing plaintiffs, and that the majority rejects this "judge-made ranking of rights."[250] Despite Justice Scalia's nod to the special role of Title VII plaintiffs as "chosen instruments," *Zipes* substantially insulates non-minority employees from attorneys' fee liability on the theory that such intervenors were protecting their own "rights" and "legitimate expectations," although the attorneys' fee issue can arise only after a judicial determination that the intervenors did not have such rights and their expectations were not legitimate. *Zipes* elevated even the colorable, but invalid claims of nonminority litigants above the social policy of Title VII enforcement articulated in *Christiansburg Garment Co.*[251]

While the elevation of the rights of non-minority employees may be the most dramatic change in the new approach, plaintiffs do not fare well against employers either. *Wards Cove Packing*[252] is the clearest example. The icy tone of Justice White's opinion carries no apology or regret that what Justice Blackmun called the "plantation economy"[253] of the packing industry is placed beyond challenge. It contains no hint that

246. Lorance v. A.T. & T. Technologies, Inc., 109 S. Ct. 2261 (1989).

247. Congress intended to protect vested competitive seniority rights of employees, even if the seniority system perpetuated the effects of the employer's prior discrimination. The loss by innocent employees of job benefits long earned and relied upon was too high a cost. *See* International Bd. of Teamsters v. United States, 431 U.S. 324, 352-354 (1977).

248. Independent Fed'n of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989).

249. *Id.* at 2737-38 (emphasis added) (quoting Teamsters v. United States, 431 U.S. 324, 372 (1977)).

250. *Id.* 2737-38 n.4.

251. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

252. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

253. *Id.* at 2136.

any Title VII principle could require the packing company to so much as post a notice that non-cannery hiring is about to commence.

Instead, by requiring separate analysis of each challenged employment practice, the majority adopted a statistical standard impossible for plaintiffs to meet. As if that were not enough, the Court modified the traditional impact proof model to shift the burden of proof on business justification to the plaintiff.

The most direct evidence of the majority's elevation of employer's rights is the significant change in the standard of business justification. In effect, the *Wards Cove* majority held that an employment practice which has a grossly disparate impact upon minorities is justified by a *de minimis* difference in cost, convenience, or efficiency, notwithstanding the availability of substantially adequate non-discriminatory alternatives. This holding elevates any interest of the employer, regardless of its weight or the degree to which it is impaired, above the plaintiff's interests in equal employment opportunity. It precludes any sort of balancing of needs or interests. Justice Scalia's rhetoric to the contrary, this holding reflects nothing less than the majority's own "judge-made ranking of rights."[254]

Another significant indication of the Court's elevation of employers' interests at the expense of plaintiffs is implicit in *Zipes*. Justice Blackmun's concurring opinion fashioned an approach which would protect nonfrivolous intervenors from fee awards by placing fee liability on the Title VII wrongdoer whose discrimination had necessitated the remedy. However the majority opinion does not even address that approach as an option. While discussing the competing interests of the two sets of employees (the plaintiffs and the intervenors), the majority simply assumes that the fee liability of the employer extends only to the expenses caused by the employer's defense but does not extend to fees caused by the employer's underlying violation of Title VII. This despite the fact that continued liability for plaintiff's attorneys fees would discourage employers from bargaining with plaintiffs by sacrificing the legitimate rights of other employees (a conceptual underpinning of the majority's opinion), and thus would serve the interest of both plaintiffs and intervenors.

It can be no coincidence that, in seven out of the eight major employment cases, the interests of the employers and/or non-minority employees were protected at the expense of plaintiffs' interests. The new majority has rejected the Court's role in effectuating the congressional policy underlying Title VII's enactment. No longer will the interests of minority and women employees receive special consideration from the Court, and in some instances, the interests of employers and non-minority employees will be elevated far above those of minority employees.

The second major ideological principle at work in the 1989 term is a

254. *Id.* at 2138.

strong antipathy for systemic remedies as opposed to individual remedies.

Witness first the adoption of the strict scrutiny standard for state and local governments' remedial schemes in *City of Richmond*. The nearly impossible statistical proof standards required to justify a race-conscious plan insure that few such plans will survive — clearly the Court's intention.

Nor do system-wide challenges to private employment practices fare better. In *Wards Cove*, the Court used the same method — impossibly high statistical proof requirements — to effectively curtail multi-component challenges, and significantly toughened the proof model for all disparate impact cases.

The relationship between the disparate impact proof model and systemic remedies is both theoretical and practical. Although seldom articulated so directly, one of the ideological underpinnings of the disparate impact model is the notion that employers ought to do what they reasonably can do in order to improve employment opportunities for disadvantaged groups. Thus, employers were not to use employment practices which had a disparate impact unless those practices were really necessary. While usually unspoken, the converse was also true. The advantages to avoiding a disparate impact challenge altogether operated to encourage employers to utilize employment practices which would insure at least a minimal degree of employment opportunity for minorities and women. So, conceptually, the disparate impact proof model implements significant elements of the affirmative action principle.

Even absent this conceptual similarity, the effects of disparate impact prevention and remedies are systemic in nature. Prevention usually requires work force analysis, statistical studies of particular employment practices, and affirmative efforts to increase minority participation. Remedies for disparate impact usually require additional affirmative measures. So the Court's rather transparent intention to make the disparate impact model less viable is further evidence of the increasing disfavor of systemic remedies for discrimination.

The holdings in *Martin* and *Zipes*, resulting as they will in the challenge to and possible dismantling of large numbers of functioning remedial decrees, are two more pieces in the puzzle. Juxtaposed against the severe time limitations placed upon challenges to seniority systems by *Lorance*, it is clear that both systemic challenges and remedies are targets in these three cases as well.

Additionally, it is noteworthy that, of eight cases, the only successful minority or woman plaintiff was the disparate treatment plaintiff. *Price Waterhouse* was the only occasion on which the Court protected the plaintiff's interests over those of the employer, but it was a major ruling without which the disparate treatment model could have been vitiated.

Finally, the Courts' substantial re-emphasis on the concept of intent is key to the shutting down of systemic remedies. *Wards Cove*, and its

predecessor *Watson v. Fort Worth Bank and Trust*, signal a conceptual return to "intent" in the context of the disparate impact proof model.[255] *City of Richmond* spoke of "individual victims" and a "*prima facie* case" against individuals in the construction industry. *Lorance* and *Betts* both focused on proving actual intent to discriminate by enactment of a seniority or benefit system, and *Betts* elevated proof of intent to part of the *prima facie* case.

Price Waterhouse and *City of Richmond* remind us that the conservative Justices have their differences. Justices O'Connor and White were the swing votes in *Price Waterhouse*, reflecting some reason for optimism for individual disparate treatment plaintiffs seeking individual remedies. Justices Scalia and Kennedy wrote concurring opinions significantly to the right of the majority holding in *City of Richmond*, boding ill for future affirmative action plans to come before the Court — plans raising issues beyond the limited scope of voluntary remedial plans by state and local governments.

Despite these differences, however, the consensus is transparent. Absent a strong congressional response to the 1988 term, the Court is likely to continue the course which it has charted by the conceptual framework of its recent holdings. The Court will pay careful attention to the interests of non-minorities and employers, rejecting the principle that the strong national policy underlying the Civil Rights Act of 1964 requires a construction of Title VII which makes it a forceful tool for societal change. The Court will continue to close down opportunities for systemic remedies, whether aimed at discrimination by a particular employer, or a particular industry, or at historic societal discrimination.

The Court may not admit these agenda items, but instead may take the sorts of opportunities selected for the 1989 term: the manipulation of burdens of proof and issues of causation (*City of Richmond*, *Wards Cove Packing*, and *Price Waterhouse*); the creation of nearly impossible statistical and other evidentiary requirements (*City of Richmond* and *Wards Cove*); technical construction of statutory language (*Martin*, *Patterson* and *Lorance*); and the continuing emphasis on and construction of the concept of intent (*Wards Cove Packing*, *City of Richmond*, *Martin*, and *Lorance*).

The Court may sometimes claim to reaffirm the goals of ending discrimination and the importance of the viability of Title VII but will construct and justify its adverse holdings by the same sorts of devices it used in the 1988 and 1989 terms. The Court will give with one hand but take away with the other.[256] *Watson v. Fort Worth Bank and Trust* purportedly extends the scope of disparate impact analysis while creating nearly impossible proof requirements. *Patterson v. Mclean Credit Union* reaffirms the application of § 1981 to private employment contracts while limiting the definition of "making a contract" to include only hiring decisions. *City of Richmond* ostensibly allows race conscious plans by state and local

255. Note, *The Supreme Court, 1987 Term-Leading Cases*, 102 HARV. L. REV. 143, 308, 316 (1988).

256. Patterson v. McLean Credit Union, 109 S. Ct. at 2379 (Brennan, J., dissenting).

governments but applies such strict review that the plans become virtually impossible to justify and tailor.

Convenient concern for *stare decisis* will mandate a holding when it serves one of the agenda items (*Lorance*), but will not stand in the way of destroying 18 years of pro-plaintiff precedent without so much as a reason for the change *Wards Cove Packing*: "but to the extent that those cases speak of an employers' 'burden of proof' — they should have been understood to mean an employers' production — but not persuasion — burden."[257] *Patterson* demonstrates that some genuine fidelity to *stare decisis* will impose some restraint on the Court's reshaping of civil rights law. The reformulation of one issue into another issue will guarantee the desired result *Martin*: the lower courts holding that decisions based on a court order do not constitute intentional discrimination rearticulated as a question of whether third parties may be required to intervene under the Federal Rules of Civil Procedure.

The legitimate concern that employers will be forced to use quotas will be used to justify the continued shutting down of systemic remedies. *Watson v. Fort Worth Bank and Trust, Wards Cove Packing, City of Richmond.* Strained or technical constructions of statutory language will seem to force the desired holding. *Patterson, Lorance, Betts, Martin.* Circumstantial evidence will continue to be discounted in cases requiring substantial statistical proof, with no admission that this is a deviation from normal rules of evidence, nor any justification for the different standard. *Wards Cove* and *City of Richmond.*

The real effects of the Court's holdings will be washed away by simple denial. Examples of these effects may be found in *Zipes*: the prospect of uncompensated fees of $200,000 or more will not discourage private plaintiffs form bringing Title VII claims; *Wards Cove Packing* and Justice Kennedy's dissent in *Price Waterhouse*: broad discovery rules and the EEOC's record-keeping requirements will provide plaintiffs with all the necessary information to comply with difficult proof requirements. Holdings will be justified by the familiar and convenient use of the old saw that Congress either did or didn't ratify by silence or by some other enactment—or by its converse, that Congress revisits Title VII often and can always act if it does not agree.

The new Court's two ideological principles, that is the favoring of the interests of employers and historically advantaged employees over those of women and minorities, and the restriction of Title VII's force to individual claims with individual remedies effectively signals the demise of a strong national policy of aggressively working toward equal employment opportunity. In order to evaluate this action and determine the appropriate congressional response, it is necessary to explore the theoretical underpinning of Title VII and of the Court's present ideological principles.

It is not possible to isolate a single controlling theory which moti-

257. 109 S. Ct. at 2126.

vated and guided America's struggle for racial equality over the past twenty-five years. A variety of ideas and forces were at work. In part, lawmakers and judges accepted a view of humanity which rejected racism and assumed the existence of morally prescribed minimum standards of dignity and well-being. In response, they wished to eradicate the socio-economic vestiges of slavery and racial segregation. Policy was also guided by free market rationalism which sought to open economic decision-making to rational principles rather than allowing such decision-making to be blocked by logically irrelevant barriers such as race or sex. Moreover, Title VII and the case law which strengthened it arose in an era which foresaw unlimited economic growth. It was assumed that government policy could facilitate a growing pie, so that the status of the underclass could be uplifted without serious cost to historically advantaged groups. Technology and automation were increasingly rendering obsolete an unlettered lower class, so that this group which had once had economic utility as "common labor" or "hands" would become a burden to society.

After twenty-five years, the Supreme Court has reassessed this aggressive quest for racial and sexual equality. The first likely justification for abandoning the quest would be that the goal has been sufficiently achieved. That, however, is not the case.

Using the economic status of African Americans as an example, the statistics belie any notion that the goals of Title VII have been achieved. Indeed African Americans constituted a more disproportionate share of the nation's unemployed in 1985 than in 1967. Their unemployment rate in the first quarter of 1989 was 2.5 times that of whites. In 1967, African American families' median income was 59% of median income of white families. By 1985, that figure had dropped to 57.6%. African Americans have made steady progress in managerial and professional occupations, but at a rate which would achieve parity only in another fifty-four years.[258]

It is unlikely that the Court is operating, or that Congress will operate, under any illusion that the goals of Title VII have been achieved. It is more likely that the Court has recognized that Title VII's goals cannot be achieved without the support of educational and job training programs which have already been dropped from federal policy. Yet, the inadequacy of civil rights legislation to accomplish its task does not call for its dismantling but rather its preservation until supplementary programs can be set in place. Nor does the inadequacy of Title VII explain the Court's action in clearing the way to attack existing decrees which have resulted in jobs for women and minorities. The ideological premises of the conservative bloc indicate a hostility to Title VII's successes rather than its failures to achieve racial equality.

The assault on systemic remedies and the elevation of the employer's interests (especially interests in autonomous decision-making)

258. B. Tidwell, STALLING OUT: THE RELATIVE PROGRESS OF AFRICAN AMERICANS 18-26 (Washington: The National Urban League Research Department, 1989).

may be understood in terms of the United State's declining economic power in increasingly competitive world markets. The underlying premise of the conservative bloc may be that American business needs to be freed from the burdens of Title VII if it is to compete effectively and thereby benefit American society as a whole. In the narrow context of minority set-asides and some affirmative action decrees, advancing the interests of minorities and women has occurred at the expense of legitimate business interests such as efficiency and productivity, in that the most qualified applicant has not always been hired and the low bidder has not always been awarded the contract. Yet the Court's express concern goes beyond these cases in which such interests are overtly subordinated to the goals of racial and sexual equality. The Court is concerned that employers will use numerical quotas as a safeguard against civil rights liability, thus adjusting their management policies on the basis of social policy factors which will not contribute to efficiency, productivity, and general competitiveness.[259]

The Court is operating here in two modes — the mode of economic policy-making and the mode of distributive justice. From the standpoint of economic policy, the Court's premise is dubious. There is a total dearth of evidence that businesses operating under affirmative action decrees have been unable to compete effectively with businesses not subject to such decrees. The existence of surreptitious quota systems is speculative and unproven. It is doubtful that employers will be so willing to relinquish their managerial autonomy when genuinely neutral subjective decision-making remains lawful. The real effect of a viable disparate impact model is to raise a red flag before the employer's eyes, when its practices have a substantial disparate impact on a protected group, so that prudence will require that employer to insure that its practices are genuinely neutral and reasonably necessary to its business enterprise.

Nor can it be argued persuasively that productivity is impaired by the cost of internally monitoring compliance. The small employer can insure compliance without extensive personnel analysis. The large employer must have in place a personnel department which will insure fair and reasonable employment practices for the benefit of morale and productivity even absent Title VII. Any added management costs attributable to disparate impact analysis of affirmative action decrees would be *de minimis*.

In summary, there is not a compelling factual case, from the standpoint of economic policy, for the Court's departure from the twenty-five year old policy of advancing racial and sexual equality. Instead, the Court is operating from a Spencerian economic utilitarianism which trusts a free market (i.e., a market in which management is free of non-contractual obligations to labor and society) to produce the greatest good for the greatest number, albeit at the expense of those who enter

259. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989); Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777 (1988).

the competition with a disadvantage. Interestingly, few if any of the emerging competitors in the world markets operate on the basis of this nineteenth century philosophy. While it is not unprecedented for the Supreme Court to arrogate unto itself the province of economic policy,[260] that role has been left to other branches of government for the past fifty years.[261] Deference to the modern federal system, and the superior capacity of Congress and the executive branch to fully assess such complex questions would dictate that such decisions should be eschewed by the Court.

Regarding the distributive justice mode, the Court is at least attempting to perform its proper function. Moreover, even if the economic policy considerations mitigated against preservation of a viable Title VII, it might be hoped that our society would not sacrifice distributive justice to productivity. Yet, what is just in this context? In *Zipes*, the conservative bloc "welcomed" non-minority interveners to protect "the legitimate expectations of employees innocent of any wrongdoing."[262] The Court seems painfully aware that the socio-economic advancement of minorities and women can be accomplished only at the expense of non-minorities and men who have not personally oppressed anyone. The Court is consistently concerned to insure that members of historically advantaged groups not be deprived of the fruits of their qualifications and merit in order to advance the goals of racial equality.

The Court's new conception of Title VII is akin to the concept of a statutory tort action with limited remedies. The Court conceives of individuals with statutory rights to be free from discrimination, and entitled to injunctive relief against wrongdoers who intentionally violate those personal rights. This framework is suggested throughout the 1989 decisions. For example, in *City of Richmond*, the Court disallows remedies for societal discrimination, limits remedies to industrial discrimination, and refrains from limiting remedies to the City's own discrimination only because strict scrutiny had killed the remedies anyway.[263] Civil rights remedies, in the mind of this Court, may operate only against tortfeasors.

Such a conceptual framework, however, is grossly inadequate to comprehend the distributive justice issues which are at the heart of civil rights litigation. We have inherited a *de facto* caste system which itself is a remnant of slavery, segregation, and *de jure* denial of women's status as adult citizens. This system is perpetuated sometimes by racial and sexual stereotyping (*Price Waterhouse*), sometimes by actual conspiracies to foreclose opportunities to disadvantaged groups in order to hoard them for the advantaged group (*Lorance*), sometimes by customs and practices which skew applicant flow (*Wards Cove*), sometimes by legacies of racism and sexism which discourage women and minorities from even compet-

260. J. NOWAK, CONSTITUTIONAL LAW 343-44 (3d ed. 1986) (discussing Lockner v. State of New York, 198 U.S. 45 (1905)).

261. *Id.* at 114.

262. 109 S. Ct. 2732, 2736 (1989).

263. *See supra* note 39.

ing for economic opportunities historically reserved for whites and/or males (*City of Richmond*), sometimes foreclosed by social networks, and sometimes by the racism and sexism which have impaired the educational, social, and professional formation of disadvantaged groups so as to handicap them in free market competition.

The result of this inheritance is a distribution of wealth and opportunity disproportionate either to individual need or individual merit. It is disproportionate to need in that human needs are relatively equal; and to the extent that needs are unequal, the needs of the disadvantaged groups are greater as a result of past deprivation; yet, the greater wealth and opportunity goes to the advantaged groups. It is disproportionate to merit in that the distribution is irrationally skewed by discrimination whether at the personal, industrial, or societal level. Advantages born of such discrimination do not correspond to merit in any ethical sense. Thus members of the advantaged groups, even though they may be personally innocent of wrongdoing are unjustly enriched. Correspondingly, disadvantaged groups are unjustly impoverished; and the larger society, including all groups, is impoverished by the suppression of potential contributions by members of disadvantaged groups on arbitrary and anachronistic grounds.

The Court's concept of civil rights actions as statutory tort claims does not comprehend the equitable nature of Title VII remedies, the ethical grounding of the statutory scheme in the concept of unjust enrichment, or the systemic and societal goals of civil rights legislation. If civil rights claims were tortious in nature, they would entail jury trials, actual and punitive damage awards, a much longer statute of limitations, and no mandatory administrative procedure before filing. Instead, the statutory scheme is framed so as to favor negotiated and equitable resolutions, with limited monetary liability exposure for employers, but including aggressive prospective remedies.

The present Court operates from a highly atomistic, individualistic view of society. Hence, it can support the claims of a plaintiff such as Ann Hopkins in *Price Waterhouse* but is strongly disinclined to permit the problems of racism and sexism to be addressed systemically by either legislation or lower courts. Discrimination issues are restricted to one-on-one showdowns, deciding who is right and who is wrong. Such a distortion of civil rights legislation leaves only a hollow echo of the ideals which formed this social policy for these past twenty-five years. The result will almost certainly be a closing of many doors now open to women and minorities, a fortifying of the *de facto* socio-economic caste system, and growing disparity of wealth between the haves and the have-nots. Moreover, this cannot be a mere return to bygone years, as the technological obsolescence of the unlettered lower class has rendered the status of the poor far more desperate.

IV. The Congressional Response

In light of the current makeup of the Court and the majority's ap-

proach to vital Title VII issues, the only recourse for preservation of much of Title VII's vitality will be a congressional response.[264] Much legislative work will already be required simply to address the major results of the 1989 term. The following is a list of legislative actions necessary to respond to the 1989 cases.

1. Congress must review the economic status of minorities and women and find that the effects of hundreds of years of discrimination have not yet been eradicated. Congress must reaffirm the strength and importance of the national commitment to eradicating the effects of discrimination and to opening channels to economic progress for all American citizens.

2. Congress should clarify the scope of § 1981 to establish that its prohibitions against racial discrimination apply to all phases of making, performing and enforcing private contracts but excluding from coverage those employment relationships subject to Title VII.

3. The 180/300 day filing requirement should be amended to clarify that, in the case of intentionally discriminatory seniority systems, such time period should commence to run upon notice to the employee of actual adverse action based upon the seniority system. "Adverse action" would be defined as action negatively affecting wages, benefits, terms, or conditions of employment other than seniority status as such.

4. Congress should clarify that employment actions taken in the good faith belief that they were required by an existing court order do not violate Title VII. This principle should be enacted as an affirmative defense so that the burden of its proof will fall on the party with better access to the evidence, the employer. However, affirmative action decrees should remain subject to the continuing equitable jurisdiction and oversight of the Court, and be subject to periodic reviews to be held after public notice to all interested persons.

5. Congress should require that, prior to the entry of a remedial decree, the parties must jointly identify and notify potentially affected groups, and the Court must hold a fairness hearing in order to consider the positions of these groups. Congress should include a fee provision requiring the defendant to pay the prevailing plaintiff's reasonable attorney's fees during the entire remedial phase unless the plaintiffs' actions are found to be frivolous, unreasonable, or without foundation. If some portion of plaintiff's fees were incurred in response to frivolous or unreasonable actions on the part of an intervenor, the intervenor would pay that portion of plaintiff's fees rather than the defendant.

6. Congress should enact a third category of Title VII violation prohibiting the use of employment practices which have a substantially

264. The Fair Employment Reinstatement Act, introduced by Sen. Metzenbaum, is an attempt to repair the damage done to disparate impact analysis by *Wards Cove*. S. 1261, 101st Cong., 1st Sess., 135 CONG. REC. 90-H.B. 7 (1989). Sen. Simon has introduced a bill which relies on § five of the fourteenth amendment and *Fullilove*, S. 1235, 101st Cong., 1st Sess., 135 CONG REC. 82-H.B. 5 (1989) to empower state and local governments to enact minority set-asides despite *City of Richmond*.

disparate adverse impact upon protected groups when reasonable alternatives exist. Such alternatives should be reasonably effective to serve the employer's needs, but need not be equally effective. The alternative practices and the employer's business needs should be required to be disclosed at the administrative stage of the proceedings. The new section should provide an affirmative defense for practices that have a substantial business justification. An employer's failure to comply with the record-keeping requirements of the Uniform Guidelines on Employee Selection Procedures should create a rebuttable presumption that challenged practices have a substantial disparate impact. Such record-keeping requirements would require elaboration and clarification commensurate with their new significance in light of this amendment.

7. Congress should enact a definition of "employment practices" which requires no more specificity in identifying the challenged employment practices than the employer has used in complying with the EEOC's record-keeping requirements for employers, unless more precise identification is possible by recourse to other reasonably available sources of proof.

The fourteenth amendment holding in *City of Richmond* is by far the most difficult to repair. The holding is a majority only because a three Justice plurality was willing to tiptoe around *Fullilove* based upon the "unique" enforcement power granted to Congress by § 5 of the amendment, and the § 1 constraint upon the power of states.[265] In that portion of Justice O'Connor's opinion, she supported this key distinction, in part, by quoting Professor Bohrer: "Congress may authorize, pursuant to § 5, state action that would be foreclosed to the states acting alone."[266]

It is unclear how far the plurality would be willing to take this distinction. It is possible that a carefully drafted, supported, and tailored congressional "authorization" could pass muster with one or more of the plurality, with Justice Stevens, and with the three dissenting Justices.

However, even if there is a realistic possibility that a majority would allow what would, in effect, be a congressional delegation of § five enforcement power, the risk may be too great. Constitutional construction is the one arena in which the Court is virtually uncheckable, and the risk of another more serious ruling limiting congressional power[267] may well outweigh the damage of the *City of Richmond* defeat.

265. City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 719 (1989).

266. *Id.* at 720, Justice O'Connor quoting: Bohrer, *Bakke, Weber, and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473, 512-13 (1981).

267. *See* Justice Kennedy's concurring opinion in which he writes, "[t]he process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case." City of Richmond v. J. A. Croson Co., 109 S. Ct. 706, 734 (1989).

V. Conclusion

The effects of two hundred years of slavery and another hundred years of overpowering economic discrimination cannot be eradicated by twenty-five years of Title VII and limited voluntary affirmative action plans. Most of the heavy burdens of three hundred years of injustice are still with us. It is clear that *someone* is going to have to carry these burdens. It is also clear that even quotas and affirmative action programs would only shift a small portion of these heavy burdens to America's advantaged classes — to those who, innocent though they may be, have inherited the benefits of an economic system built upon the backs of their fellow citizens — to those who are more able to carry their share of an added burden. Racism and sexism are deeply ingrained in American culture. Even the cases, selected by the Court as opportunities to reject pro-plaintiff doctrines this past term, attest to this fact, as the evidence portrays "Filipino bunkhouses", women referred to charm schools to further accounting careers, and cities with black majorities awarding all but 0.67% of their contracts to white owned businesses. It is the persistent irony of American culture that its democratic ideals continue to be undermined in this way. Yet the democratic values implicit in our governmental system are understood not as absolute accomplishments, but as goals which we are always in the process of attaining. The 1988 term of the Supreme Court is an unfortunate step backward from such attainment. It can be remedied only by prompt and vigorous congressional action.

PARTIAL REDEMPTION IN COLORADO FORECLOSURES

MORRIS B. HOFFMAN*

INTRODUCTION

When co-owners[1] of real property have different sets of creditors, and when one of those creditors forecloses, the redemption rights of all the creditors must be sorted out in the foreclosure process. Although several recent Colorado appellate court decisions have addressed this difficult issue, their inconsistent results reflect a conflict between two fundamental principles of real property, and suggest the time has come for the General Assembly to overhaul the redemption statute to provide clearer guidelines on partial redemption.

Here is the typical partial redemption example: H and W own undivided half interests in Blueacre. Bank 1 is the beneficiary of a purchase money deed of trust on all of Blueacre, securing the purchase money note which H and W both signed. C is a judgment creditor of H only,[2]

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* Shareholder and Director, Mosley, Wells, Johnson & Ruttum, P.C., Denver, Colo.; University of Colorado, J.D. (1977), B.A. (1974).

1. The term "co-owners" is used in this article to include both joint tenants and tenants in common, two of the three basic kinds of co-owners of real property. *See generally* 2 D. NILES & W. WALSH, AMERICAN LAW OF PROPERTY §§ 6.1-6.6 (1952); 4A POWELL ON REAL PROPERTY § 599 (Castleman rev. 1989); 4 J. GRIMES, THOMPSON ON REAL PROPERTY §§ 1770-1773 (repl. ed. 1979). The third form of co-ownership—tenancy by the entirety—was either abolished in Colorado long ago by the Married Women's Acts, COLO. REV. STAT. §§ 14-2-201-210 (Repl. Vol. 1987), or is now so indistinguishable from joint tenancy as to not warrant separate description. *Compare* Whyman v. Johnson, 62 Colo. 461, 163 P. 76 (1917) and 2 D. NILES & W. WALSH, AMERICAN LAW OF PROPERTY § 6.6 n. 34 (1952) (listing Colorado as one of eight states abolishing tenancy by the entirety, and citing *Whyman* as authority) *with* Marsh, *Tenancy by the Entirety in Colorado*, 13 COLO. LAW. 230 (1984) (in which Professor Marsh suggests that such a reading of *Whyman* is incorrect, and that a tenancy by the entirety can still be created in Colorado by express provision in a deed).

In any event, none of the cases has to date suggested that the issue of partial redemption should be examined differently for one type of co-ownership than for another.

2. That is, C's judgment is not within the scope of the family purpose doctrine, codified at COLO. REV. STAT. § 14-6-110 (1987 Repl. Vol.), under which C's judgment lien, if based on an obligation for "the expenses of the family [or] the education of the children," would reach *both* H's and W's interests in Blueacre.

An additional foreclosure complication which this hypothetical ignores is presented by the Colorado Homestead Act, COLO. REV. STAT. §§ 38-41-201-211 (Repl. Vol. 1982). That Act in effect immunizes from execution the first $20,000 of equity in the family homestead, and requires an executing creditor to comply with a series of procedures (including appraisals) designed to prove the existence of this equity cushion as a condition of execution.

In Frank v. First Nat'l Bank, 653 P.2d 748 (Colo. App. 1982), the Colorado Court of Appeals not only held that the Homestead Act applied to public trustee foreclosures, but also held that the homestead waiver contained in the typical form deed of trust was ineffective to waive the homestead exemption vis-a-vis a third-party bidder at the foreclosure sale. The apparent result of *Frank* was that any third-party bidder would have to bid at least $20,000 more than the amount of the foreclosing creditors' lien, even though the foreclosing creditor himself had obtained a waiver of the homestead.

The General Assembly quickly overruled *Frank*, by providing that a homestead waiver

and has a judgment lien on H's undivided half interest in Blueacre junior to Bank 1's interest.[3] Bank 2 is the beneficiary of a second deed of trust on all of Blueacre, securing a second note which H and W both executed after C's judgment lien was perfected.[4] When Bank 1 forecloses, may (or must) C redeem the *entire* interest in Blueacre (even though C has only a lien on H's half interest), and thereby force Bank 2 to redeem the entire interest from C, or may (or must) C redeem only his partial interest?

Similar difficulties arise when the partial interest results not from undivided co-ownership but rather from creditors of a single owner having different interests in different parcels of real property: A owns Parcel 1 and Parcel 2. Both parcels are encumbered by a single first deed of trust, and Parcel 1 is encumbered by a second deed of trust. When the beneficiary of the first deed of trust forecloses, must the beneficiary of the second deed of trust redeem the entire property from the sale, or can he somehow apportion the sale price between the parcels and redeem only his Parcel 2?

The junior redemption provisions of the Colorado foreclosure statute[5] are not nearly as clear as they could be on these questions.[6] This statutory ambiguity has allowed the appellate courts to look at these issues with an eye toward two fundamental and fundamentally conflicting sets of policies.

On the one hand, public policies favoring the maximization of foreclosure prices and the certainty and predictability of the foreclosure process led the Colorado Supreme Court to adopt a general rule against partial redemption. That is, a junior lienor with only a partial interest in the foreclosed property must nevertheless redeem the entire property from the sale, or lose his lien.[7]

On the other hand, it is a basic tenet of co-ownership that the interests of one co-owner may not be used to satisfy the debts of the other co-owner. In the case of separately encumbered parcels, it is also a basic tenet that a creditor with a lien on one piece of property cannot extend

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contained in a deed of trust is effective to waive the homestead for *any* purchaser or redeemer acquiring the property through foreclosure of that deed of trust. COLO. REV. STAT. § 38-41-212 (Repl. Vol. 1982). In so doing, however, the General Assembly codified that portion of *Frank* which held that the Homestead Act did in fact apply to the foreclosure of deeds of trust, mortgages and other consensual liens, a proposition not at all evident from the language of the two statutes. Of course, as a practical matter, *no* foreclosure of consensual liens need any longer be complicated with homestead issues, since lenders are now universally insisting on homestead waivers now that those waivers have been made fully effective by the post-*Frank* amendments.

3. Although there has been considerable controversy over this question, it is now clear that Colorado's recording statute, COLO. REV. STAT. § 38-35-109 (Repl. Vol. 1982), is a so-called "race-notice" statute. That is, the person who first records his interest without notice or knowledge of conflicting unrecorded interests, takes priority. *Cf.* Page v. Fees-Krey, Inc., 617 P.2d 1188 (Colo. 1980), holding that the predecessor to this recording statute was a "pure notice" statute.

4. Thus, Bank 2's interest is junior to C's interest. *See supra* note 3.

5. COLO. REV. STAT. § 38-39-103 (Repl. Vol. 1982 and Supp. 1987).

6. *See infra* text accompanying notes 21-27.

7. *See infra* text accompanying notes 28-37.

his lien to a second property not covered by the lien. As we will see, these basic principles have recently led the court in some limited circumstances to an interpretation of the statute allowing, and indeed requiring, partial redemption.[8]

THE REDEMPTION STATUTE

Under the current statute, the owner of foreclosed non-agricultural real estate has 75 days after the sale within which to redeem, by paying the public trustee or sheriff the sales price plus interest, taxes and other proper charges.[9] After the expiration of the owner's redemption period, lienors with interests junior to the foreclosing creditor have similar and sequential rights to redeem.[10]

An example serves to illustrate the process. Owner owns Redacre, which is encumbered with the following interests in the following priorities:

Creditor A	$200,000
Creditor B	$100,000
Creditor C	$100,000
Creditor D	$ 10,000

Creditor A forecloses, and bids in the full amount of his debt, plus various foreclosure costs, for a total of $210,000. Creditor A need not come up with any cash, since he is credited for the amount of his debt and certain proper foreclosure charges.[11] If he is the highest bidder, he

8. *See infra* text accompanying notes 38-50.

9. COLO. REV. STAT. § 38-39-102(1) (Supp. 1987). By contrast, the owner of "agricultural" real estate is allotted six months within which to redeem. COLO. REV. STAT. § 38-39-102(2)(a) (Supp. 1987). "Agricultural real estate" is by recent statutory amendment defined as property which is (1) completely unsubdivided, and (2) if located in an incorporated town or city, assessed as agricultural. COLO. REV. STAT. § 38-39-102(3)(a) (Supp. 1987). The predecessor to this statute defined "agricultural real estate" simply as any real estate which was not subdivided. COLO. REV. STAT. § 38-39-102(3)(a) (Repl. Vol. 1982). *See also* Rowe v. Tucker, 38 Colo. App. 532, 560 P.2d 843 (1977)(mining property is "agricultural" under old definition, since it was not subdivided).

In addition to the redemption distinction between "agricultural" and "non-agricultural" property, recent statutory changes have recognized a further sub-category of agricultural real estate—"agricultural residences." COLO. REV. STAT. § 38-39-102.5 (Supp. 1987). This new statute—a response to the "family farm crisis"—imposes many additional procedural and substantive conditions on the foreclosure and redemption of agricultural residences, and is beyond the scope of this article.

10. COLO. REV. STAT. § 38-39-103(1) (Supp. 1987).

11. Of course, nothing *requires* foreclosing creditors to bid in the amount of their debt. They are free to bid more or less, although each of these alternatives is fraught with varying degrees of danger.

If they bid more, they must pay the difference in cash. They will want to do this only if they believe the value of the property justifies it, and especially only if there are competing bids at the sale or a risk of junior redemption. Although competitive bidders sometime attend sales, in the author's experience virtually all foreclosure sales are attended only by the foreclosing creditor, who almost never bids in more than his debt. Indeed, foreclosure sales so seldomly involve competitive bids that the statute was recently amended to permit the foreclosing creditor to submit his bid by letter. COLO. REV. STAT. § 38-37-142 (Supp.

is issued a certificate of purchase,[12] which serves to identify him as the person entitled either to be repaid (if there is a subsequent redemption) or to be issued a public trustee's deed to the property (if there is no subsequent redemption).[13]

Assuming Redacre is "non-agricultural,"[14] Owner has 75 days after the sale within which to redeem, by paying the $210,000 in cash or certified funds to the public trustee, plus post-sale interest at the note rate, plus certain other proper post-sale charges.[15]

If Owner fails to redeem during his redemption period, Creditors B, C, and D have sequential rights to redeem, provided they have filed notices of intent to redeem prior to the expiration of Owner's redemption period.[16] Creditor B has ten days after the expiration of Owner's redemption period within which to redeem, followed by Creditors C and D, each of whom have five days.[17]

Creditor B can redeem by paying to the public trustee the $210,000 sale price plus interest and the proper post-sale charges; that is, the first junior redeemer's redemption price is exactly the same as the Owner's redemption price (plus, of course, any additional interest). And, like the Owner but unlike the foreclosing creditor, Creditor B must pay these monies to the public trustee in cash or certified funds. The public trustee then pays these funds over to Creditor A, takes back A's certifi-

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1987). Junior redemption is a similarly rare occurrence. As a result, foreclosing creditors very seldom will bid in more than the amount of their debt.

It is much more common for a creditor to bid in less than the amount of his debt, particularly in times of falling real estate prices. If the creditor believes the property is worth less than his debt, then he may bid in the lesser amount and retain the right to sue his borrower for the deficiency. (Colorado, unlike some states, does not yet have a so-called anti-deficiency statute. *Cf.* CAL. CIV. PROC. CODE § 580 (West 1976 & Supp. 1989). There are, however, dangers to which a creditor exposes himself when he bids less than the amount of the debt.

First, of course, he risks being redeemed out for the amount of his low bid, either by the owner or by junior redeemers, thus losing *all* rights to the collateral. Again, however, the realities of forced sales, and especially forced sales in a declining real estate market, mean that these risks of redemption are often more theoretical than real. This has emboldened many foreclosing creditors, who see the foreclosure as an opportunity to bid in a low price, artificially create a deficiency, and end up with both the collateral *and* a concocted deficiency against the debtor.

Courts have responded to the most egregious of these cases by stepping in and undoing the foreclosure sale. *See, e.g.*, Chew v. Acacia Mut. Life Ins., 165 Colo. 43, 437 P.2d 339 (1968); Tekai Corp. v. Transamerica Title Ins., 39 Colo. App. 528, 571 P.2d 321 (1977). Although the law in this area is not yet fully developed, the cautious foreclosing creditor should never bid in less than the amount of his debt, unless he has an appraisal justifying the bid and is prepared to defend the appraisal against an inadequacy attack. *See generally*, Johnson & Hoffman, *Inadequacy of Sales Price at Judicially Ordered Sales of Real Property*, 12 COLO. LAW. 1435 (1983).

12. COLO. REV. STAT. § 38-39-115(2) (Supp. 1987).

13. Certificates of purchase are freely assignable. COLO. REV. STAT. § 38-39-116 (Supp. 1987).

14. *See supra* note 9.

15. COLO. REV. STAT. § 38-39-102 (Supp. 1987).

16. COLO. REV. STAT. § 38-39-103 (Supp. 1987).

17. Recent amendments have clarified that these junior redemption periods are fixed in time at the expiration of the owner's redemption period; that is, an early junior redemption will *not* accelerate subsequent redemption periods. COLO. REV. STAT. § 38-39-103(2) (Supp. 1987).

cate of purchase, and issues Creditor B a certificate of redemption.[18]

Creditor C then has five days after the expiration of Creditor B's five-day period within which to redeem. Creditor C must pay the $210,000 plus proper post-sale costs plus the amount of principal and interest owed to Creditor B.[19] Thus, Creditor C must pay $210,000 plus $100,000, or $310,000, plus post-sale costs and interest. The public trustee then issues Creditor C a certificate of redemption, pays Creditor B his $310,000 and interest and costs, takes back B's certificate of redemption, and issues Creditor C a certificate of redemption.

Creditor D goes through precisely the same procedures; he must pay the $210,000 sale price plus the amounts of B's and C's liens, plus costs and interest. In our example, Creditor D must pay a total of $410,000 plus costs and interest.[20]

Though there are several unresolved issues related even to this simple redemption situation,[21] for the most part the process seems to run smoothly and without serious difficulties.

However, when the situation is complicated with co-ownership, thus raising the issue of partial redemption, the statutory scheme breaks down. That is because the statutory language on junior redemption simply does not deal, and has never dealt, with the possibility that a junior redeemer's lien encumbers less property than the lien of the foreclosing creditor, in either sense of the word "less"—less because it encumbers only an undivided interest or less because it encumbers only a divided parcel of the whole.

Consider our earlier example, but assume Creditor B's $100,000 interest encumbers only an undivided one-half interest in Redacre. If Creditor B wishes to redeem from Creditor A's foreclosure, does Creditor B have the right or obligation to redeem the entire property (by paying the full redemption price of $210,000), or does he redeem only the undivided half to which his lien attaches (by paying only one-half of the $210,000 foreclosure sale price)?

If Creditor B fully redeems by paying the full $210,000, then Creditor C and D redeem as if Creditor B were an ordinary lienor with an interest in all of Redacre; that is, Creditor C redeems by paying $310,000, and Creditor D redeems by paying $410,000. This, of course,

18. COLO. REV. STAT. § 38-39-104 (Supp. 1987).

19. COLO. REV. STAT. § 38-39-103(1) (Supp. 1987). This amount is determined by Creditor B filing, at the time he redeems, an affidavit stating the amount owed to him. COLO. REV. STAT. § 38-39-103(3) (Supp. 1987).

20. *See generally* Quail, *The Statutory Right of Redemption from Foreclosure*, 13 COLO. LAW. 793 (1984).

21. For example, the statute does not clearly indicate whether *all* prior junior lienors who file timely notices of intent to redeem must be paid off, or only those who themselves redeem. The latter interpretation seems to make most sense, and in the author's experience it is the interpretation adopted by virtually all public trustees. In his dissent in First Nat'l Bank v. Energy Fuels Corp., 200 Colo. 540, 547, 618 P.2d 1115, 1120 (1980), Justice Lohr suggests this result by stating that the junior liens that must be paid off are those that were "used to effect prior redemption." There is, however, no case directly on point, and the statutory language is also quite susceptible of the other interpretation.

means that Creditor B must come up with sufficient cash to redeem all of Redacre even though he only has an interest in half of it.

If, however, Creditor B is allowed or required to partially redeem by paying only $105,000, then he acquires a certificate of redemption only as to half of Redacre. What then are the redemption rights of Creditors C and D? The statute is not only unclear about the precise effects of partial redemption, it is, as we shall see, unclear about whether partial redemption is even permissible.

Prior to 1931, the applicable law required the redeeming lienor to pay "all redemption amounts previously paid,"[22] suggesting that even though a junior redeemer's lien ran only to a partial interest in the property, he was nevertheless required to redeem the entire property if he wished to redeem any of it.[23] Even this conclusion was of some doubt, however, given the modifying phrase in the pre-1931 version of this statute, which provided that the junior redemption was to be made "according to the priority of [the redeemer's] lien."[24] The argument is that the "priority" of a junior redeemer's partial interest is measured only with respect to that partial interest. Thus, if he has a second deed of trust only as to half of the property, he has the right to redeem only that half.

In 1931, this junior redemption language was revised to its current form:

> [E]ach subsequent encumbrancer and lienor in succession . . . may redeem . . . by paying all redemption amounts theretofore paid with interest and the amount of all such liens with interest prior to his own held by such persons as are evidenced in the manner required in this section. . . .[25]

Although this revised statutory language retains the requirement that the junior redeemer pay "all redemption amounts previously paid"—thus suggesting there can be no partial redemption—it adds the requirement that the junior redeemer also pay "all such liens with interest prior to his own held by such persons as are evidenced in the manner required by this section."[26] By referring to *prior* liens, some courts have suggested that this language, like its predecessor, means a junior lienor need redeem only from that portion of a foreclosing interest that was in fact prior to his own interest; that is, partial redemption is permissible.[27]

That conclusion seems to be quite a leap of faith, however. The obvious purpose of the addition is to clarify the situation that arises when there are multiple junior redemptions. As set forth in the earlier examples, the last junior redeemer must pay not only what the prior redeemer paid, but also must pay that prior redeemer's lien.[28] To suggest that the 1931 legislature had the idea of partial redemption in mind

22. 1929 Colo. Sess. Laws 538-39.
23. *See infra* text accompanying note 32.
24. 1929 Colo. Sess. Laws 538-39.
25. COLO. REV. STAT. § 38-39-103(1) (Supp. 1987).
26. *Id.*
27. *See infra* text accompanying notes 39-43.
28. *See supra* text accompanying notes 17-20.

any more than its predecessors did is to read quite a lot into an already ambiguous paragraph of the statute. Nevertheless, as we will see, these ambiguities—both pre- and post-1931—gave the Colorado Supreme Court just enough elbow room to address the issue of partial redemption with other policy considerations in mind.

WALKER V. WALLACE: PARTIAL REDEMPTION IS PROHIBITED

Although it had suggested the result earlier,[29] in the 1926 case of *Walker v. Wallace*[30] the Colorado Supreme Court held for the first time that a junior lienor with only a partial interest could, and in fact must, redeem the entire property if it wanted to redeem at all. *Walker* involved a foreclosing creditor of both co-owners, and a junior judgment lienor of one of the co-owners. The foreclosing creditor was the successful bidder at the foreclosure sale. The junior judgment lienor tendered the full sale price in an effort to redeem, but the foreclosing creditor refused to accept the money, arguing that the junior lienor could not redeem the entire property when he held an interest only in an undivided half.

The trial court held that the foreclosing creditor was justified in refusing the entire redemption amount, impliedly ruling that the junior lienor with only a partial interest could redeem only as to that partial interest. The Colorado Supreme Court reversed. It adopted the general rule, recognized in many other states, that in the absence of a statute to the contrary "property which has been sold in an execution sale in its entirety or en masse, if redeemed at all, must be redeemed en masse."[31]

The court looked at the statutory language then in effect—the redeemer had to pay "all redemption amounts previously paid"—and had no difficulty interpreting this language to prohibit partial redemption,[32] with the aid of an Illinois case construing an identical Illinois provi-

29. In Leach v. Torbert, 71 Colo. 85, 204 P. 334 (1922), the supreme court did not have to reach the partial redemption issue, since one of the putative junior redeemers in fact had no judgment lien which attached to the foreclosed property. However, the court permitted a second junior redeemer—who *did* have a record interest in an undivided half of the foreclosed property—to proceed with his lawsuit seeking redemption of the entire property. The case turned on procedural issues, and the court did not confront the partial redemption issue head on. However, by allowing the redeemer to proceed, the court at least suggested that he could not be forced by others to redeem partially.

30. 79 Colo. 380, 246 P. 553 (1926).

31. *Id.* at 384. The cases which the *Walker* court cited from other jurisdictions are: Tribble v. Wood, 186 Ala. 329, 65 So. 73 (1914); Oldfield v. Eulert, 148 Ill. 614, 36 N.E. 615 (1893); Sharpe v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911); Powers v. Sherry, 115 Minn. 290, 132 N.W. 210 (1911); O'Brien v. Kreuz, 36 Minn. 136, 30 N.W. 458 (1886); Martin v. Sprague, 29 Minn. 53, 11 N.W. 143 (1882).

Technically, the narrow holding of *Walker* was that a junior lienor with a partial interest could, if he wished, redeem the entire property. The *Walker* court was not faced with the issue of whether such a junior lienor *must* redeem the entire property. Thus, the quoted language indicating that partial redemption is prohibited, was actually dictum. That dictum became a holding in Chain-O-Mines v. Williamson, 101 Colo. 231, 72 P.2d 265 (1937). *See infra* note 38.

32. *See supra* text accompanying note 23.

sion.[33] It did not address the "according to the priority of his lien" language, which arguably suggests a contrary result.[34]

In *Walker* the court went on to justify its decision on broader policy grounds, namely that by prohibiting partial redemption, it was insuring that foreclosed property would be used to satisfy as many debts as possible.[35] In addition, under the facts in *Walker*, this full use of the property did not injure anyone, since the foreclosing creditor was fully repaid.[36] Unmentioned, of course, is the fact that the redeeming creditor obtained a windfall by acquiring 100% of the equity in the property (though, admittedly, he had to pay 100% of the senior debt), even though his interest attached only to fifty percent.[37]

The *Walker* rule was extended in 1937 to the partial-redemption-by-parcel situation, when the court ruled that a junior lienor as to one parcel had to redeem *en masse* as to all the foreclosed parcels.[38]

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33. Durley v. Davis, 69 Ill. 133 (1873).

34. *See supra* text accompanying note 24.

35.

> The property is thus made to pay as many debts of the judgment debtors and each of them as is possible, whereas, if Walker did not have the right to redeem the entire property of the judgment debtors, there having been no redemption by them, it would be appropriated to the payment of one only of the two debts.

Walker, 79 Colo. at 385-86, 246 P. at 555.

36.

> The plaintiff Wallace cannot possibly be injured for there has been tendered to the sheriff for his use the entire amount which he bid at the sale, with all interest and costs. . . . Nothing has been taken from him. He will receive his entire claim against these two tenants in common of the property, who were his judgment debtors.

Id. at 385.

37. For example, assume that the property had a value of $100,000, that $50,000 was owed on the first deed of trust, and $20,000 on the judgment lien encumbering only half the property. Assume also that the holder of the first deed of trust foreclosed, and was the successful bidder by biding in his full $50,000 debt. If the owner fails to redeem, then the foreclosing creditor and the judgment creditor are fighting over a substantial equity. If the judgment creditor is allowed to redeem the *entire* property by paying off the first, he acquires *all* of the equity ($100,000 in value less $50,000 to redeem less the $20,000 already owed to him, for a total of $30,000), and the foreclosing creditor acquires none of it. If the judgment creditor is allowed only to redeem the undivided half to which his lien attaches, he acquires only a small fraction of the equity ($50,000 in value less $25,000 to redeem less the $20,000 already owed to him, for a total of $5,000). Even this calculation assumes that the value of an undivided half interest in property is half of the value of the whole, an assumption of questionable accuracy: "It requires no appraisal expertise to conclude that an undivided one-half interest in a piece of real property is not worth one-half the value of the entire real property." First Nat'l Bank v. Energy Fuels Corp., 618 P.2d 1115, n.3 (1980) (Lohr, J., dissenting). If an undivided half interest is in fact worth less than one-half of the value of the whole, a partial redemption is even less attractive to the junior partial lienor.

It is this battle over equity which drives the dispute between the putative partial redeemer and other creditors with liens on the entire property.

Conversely, if there is not enough value in the property to satisfy all the debts, then the partial creditor will not want to be forced to redeem the entire property, and he and the full creditor reverse roles on this issue of whether partial redemption should be allowed and whether it should be mandatory.

38. Chain-O-Mines v. Williamson, 101 Colo. 231, 72 P.2d 265 (1937). This case involved an option to purchase a portion of a group of mining claims. Citing *Walker*, the court refused to allow the redemption of a portion of claims from a foreclosure of the entire group.

FIRST NATIONAL BANK V. ENERGY FUELS CORP.: PARTIAL REDEMPTION IS REQUIRED

The Colorado Supreme Court did not have another opportunity to examine the question of partial redemption until 1980, when it decided *First Nat'l Bank of Southglenn v. Energy Fuels*.[39] In that case, a husband and wife owned their residence in joint tenancy, and had executed a first deed of trust for the benefit of an unnamed bank (Bank 1). Energy Fuels was a judgment creditor of husband only, and perfected a judgment lien against husband's interest in the property, junior to Bank 1's interest. After that perfection, husband and wife executed a second deed of trust on the property for the benefit of Chatfield Bank, and then a third deed of trust on the property for the benefit of First National Bank.

Bank 1 foreclosed, was the successful bidder at the sale, and acquired a certificate of purchase to the property. Energy Fuels, Chatfield, and First National Bank all filed timely notices of their intent to redeem, and each deposited with the public trustee amounts sufficient to redeem the entire property from Bank 1.

The public trustee, in accordance with the holding of *Walker*, concluded that Energy Fuels had the first right (and, indeed, obligation if it wanted to redeem at all) to redeem the entire property even though its lien attached only to husband's undivided half interest. Chatfield filed suit in the district court, arguing for partial redemption—that is, that it had the first right of redemption with respect to wife's half interest, and that Energy Fuels had the first right of redemption only with respect to husband's half interest.

The district court agreed with Chatfield, and Energy Fuels appealed. The court of appeals, also relying on *Walker*, held that no partial redemption was permissible, let alone required, and that Energy Fuels had the first right of redemption with respect to the entire property.[40]

The Colorado Supreme Court, in an opinion by Justice Erickson and with a dissent by Justice Lohr, reversed the court of appeals, holding that the redemption rights were to be prioritized as to each undivided half interest. It distinguished *Walker* on this key fact: In *Walker*, there were no lienors junior to the redeeming partial lienor. Therefore, no one was injured by the partial lienor's full redemption (except, as discussed above, in not obtaining the equity windfall).[41] In the *Energy Fuels* case, however, if Energy Fuels were allowed to redeem the entire interest, the subsequent lienors—Chatfield and First National Bank—would be forced to redeem the entire interest, and this would have the indirect result of using wife's half interest in the property to pay husband's judgment (assuming, of course, that the amount of the judgment against husband was more than the value of husband's undivided half interest in the equity in the property).[42]

39. 618 P.2d 1115 (Colo. 1980).
40. Chatfield Bank v. Energy Fuels Corp., 42 Colo. App. 233, 599 P.2d 923 (1979).
41. *Energy Fuels*, 618 P.2d at 1119. *See supra* note 37 and accompanying text.
42. For example, assume that the property was worth $200,000 (that is, each undi-

The Court also distinguished *Walker* on the basis of the statutory change in 1931, emphasizing the added phrase "and the amount of all such liens prior to his own." The majority concluded that this language suggested the redeeming lienor could *not* redeem the entire property, since the foreclosing creditor's lien was "prior" only to an undivided half of the redeemer's lien.[43]

Justice Lohr's dissent attacked the majority opinion both as a matter of statutory interpretation and on policy grounds. He emphasized the first phrase of the redemption provision—"pay all redemption amounts"—and quite correctly pointed out that the second phrase was obviously added merely to address the situation of multiple junior redemption, and not to permit partial redemption.[44] He also invoked the general rule announced in *Walker* that partial redemption should not be allowed in the absence of clear statutory authority otherwise.[45] Finally, while conceding that a "no partial redemption" rule can in some circumstances do violence to the common law precept that the property of one co-owner cannot be used to satisfy the debts of the other co-owner,[46]

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vided half was worth $100,000), that Bank 1's purchase money note had a balance of $100,000 at the time of the sale, that Bank 1 successfully bid the full $100,000 at the sale, and that the amount of Energy Fuel's judgment against H was $75,000 at the time of the sale. If Energy Fuels were allowed to redeem the entire property from Bank 1's purchase, then Chatfield could redeem from Energy Fuels for $175,000 ($100,000 to Bank 1; $75,000 to Energy Fuels). If that happened, then $50,000 of each of H's and W's interest would have gone to pay Bank 1, and $37,500 each would have gone to pay Energy Fuels. Thus, a significant portion of the value of W's undivided interest ($37,500 out of $50,000) would have gone to pay H's debt to Energy Fuels.

The *Energy Fuels* court correctly recognized that the existence of a lienor junior to the redeemer raised the possibility of this inequity, and distinguished *Walker* on that basis: "*Walker* concerned only one creditor seeking to redeem. This case involves competing lienholders who each possess a superior lien on separate interests of real property held in joint tenancy." 618 P.2d at 1119.

However, as discussed in more detail in note 63 *infra* and in the text accompanying notes 64-66 *infra*, the majority opinion is a bit disingenuous in describing this problem as "using wife's property to pay husband's debts." By the time partial redemption becomes an issue, the owners' redemption period has already expired, and neither husband nor wife has any interest in, let alone any equity in, the property. Any "inequity" lies in giving this windfall to husband's creditor instead of the joint creditor, and this may not be inequitable at all. *Id.*

43. "The applicable redemption statute in 1926 was markedly different from section 38-39-103(1), C.R.S. 1973." *Id.* at 1119. Footnote 5 states, "Section 5951, Compiled Laws of Colorado 1921 stated that the redeeming lienor must only pay 'the amount of money for which said premises shall have been sold.' Section 38-39-103(1), C.R.S. 1973, requires this lienor to also pay the 'amount of . . . liens . . . prior to his own.' This 'prior to his own' language forms the basis of our decision and was not present in *Walker*." *Id.*

44. *See supra* text accompanying note 28.

45. "Although statutory content governs the results of statutory redemption cases, it is worthy of note that the general rule is 'that a mortgage is an entire thing, and must be redeemed as such, and that the mortgagee cannot be compelled to divide his debt and his security'." 618 P.2d at 1121 (Lohr, J., dissenting, quoting 9 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 745 (1958)).

46.

> The majority correctly points out that to [deny partial redemption] utilizes Kathleen Pickering's property to reduce Ben Pickering's debt. However, the construction adopted by the majority leads to other problems not raised as issues in this case.

Id. at 1121.

Justice Lohr articulated two policies which disfavored partial redemption: maximizing foreclosure prices (a policy recognized by the *Walker* court) and the policy of maintaining certainty and predictability in foreclosure proceedings.

The policy of maximizing foreclosure prices is a longstanding one, which the majority rule allowing partial redemption undoubtedly damages. Foreclosure prices—already depressed by the realities of forced sale—will feel even more downward pressure as foreclosing creditors face the harrowing prospect of waking up one day with an uninvited coowner. Lenders may even be less willing to make real estate loans at the outset. It is difficult enough for secured lenders to minimize bad loan losses through foreclosure, let alone to have to try to cut those losses by selling undivided interests.

However, Justice Lohr does not explain in any detail why the majority's rule requiring partial redemption in these circumstances introduces any special uncertainty or unpredictability in the foreclosure process. True, when a creditor takes a lien encumbering only part of a piece of real property (either an undivided interest in all the property, or an interest in a separate parcel), he has no way of knowing at that time whether junior lienors as to all of the property might come along. If they do, *Energy Fuels* says our creditor will not be able to redeem the entire property from foreclosure by a senior creditor. If they do not, *Walker* says our creditor *must* redeem the entire property. This undoubtedly puts our creditor in a somewhat uncertain position. However, this uncertainty can be avoided entirely, at least in the single parcel situation, if our creditor takes his security interest in *all* of the property. True, some lienors (such as judgment lienors) have no choice but to take their interest in only a part of the property, but the very fact that these kinds of involuntary lien creditors have no choice means any uncertainty about the value of their liens will have little or no commercial impact at the outset of transactions. This author is not aware of any lenders who intentionally and regularly make loans collateralized by undivided interests in real property. Indeed, almost all of the significant Colorado cases on partial redemption, not surprisingly, have involved a redeemer whose partial interest arose by way of an involuntary lien. Under these circumstances, it is difficult to imagine how a rule requiring partial redemption will cause any special uncertainty in the foreclosure process.

Moreover, the identity of all junior lienors is fixed at the expiration of the owner's redemption period,[47] so our creditor will know before he tenders his redemption amount whether he may redeem the whole property or only his portion. Thus, any uncertainty disappears before the junior lienor must make his decision to redeem.

Finally, in view of several fundamental questions which still abound in the area of junior redemption—including, for example, what the redeemer must pay and to whom[48]—it is hard to imagine that partial re-

47. COLO. REV. STAT. § 38-39-103(2) (Supp. 1987).
48. *See supra* note 21.

demption will introduce any more uncertainty than is already currently embedded in the redemption process.

Justice Lohr's statutory construction argument is much more difficult to avoid. Even if it cannot be said that the current statute unequivocally prohibits partial redemption, it certainly does not unequivocally mandate it. The fact is that the statute is hopelessly ambiguous on this issue, as it is on many other redemption issues. These ambiguities were not eliminated by the 1931 amendments, but in fact in some ways may have been exacerbated by them.[49]

Before *Energy Fuels*, the law in Colorado and elsewhere was that partial redemption would not be allowed absent a clear statutory directive. This was the touchstone of the *Walker* case. Although Justice Erickson's opinion in *Energy Fuels* may make good policy sense, it seems to do considerable violence to the *Walker* precedent recognizing a built-in presumption against partial redemption. Perhaps Justice Lohr's complaint of "uncertainty and unpredictability" was aimed not at the notion of partial redemption itself, but at the deeper target of the court's own failure to respect its precedent in this area.

In any event, one might at least argue that *Energy Fuels* settled this matter of partial redemption once and for all by drawing a clear line between the circumstances when one may only partially redeem, and when one must redeem the entire property. As two recent cases have demonstrated, however, this line is not nearly as clear as it might seem.

THE GRAY AREA

Once the *Energy Fuels* Court let the genie of partial redemption out of the bottle, it soon became evident that the endless variety of foreclosure conditions would raise endless questions of exactly where the *Walker* rule ends and the *Energy Fuels* exception begins.

For example, in *Sant v. Stephens*[50] the federal district court was faced with a redemption issue complicated by the fact that separate foreclosure proceedings were commenced against the same property. The holder of a deed of trust on co-owned property began the first proceeding, foreclosing on the entire property, and the holder of a second deed of trust encumbering only an undivided half interest in the property commenced a second foreclosure only as to that undivided half. The sale on the partial interest took place before the sale on the entire interest, presumably because the full foreclosure sale was continued. A municipality held a statutory lien for unpaid utility assessments as to the entire property,[51] and its assignee did not redeem from the foreclosure on the partial interest, but did redeem from the foreclosure on the entire property. An understandably befuddled public trustee issued a pub-

49. *See supra* text accompanying notes 25-27 .

50. 580 F. Supp. 1003 (D. Colo. 1983).

51. One of the critical issues in the case was whether this kind of statutory lien did in fact give rise to a right of junior redemption. The Colorado Supreme Court ultimately ruled that it did. Sant v. Stephens, 753 P.2d 752 (Colo. 1988).

lic trustee's deed on all of the property to the redeemer from the full sale, followed a few days later by a public trustee's deed on an undivided half of the property to the third-party bidder at the partial sale. The redeemer sued.

The federal district court ruled that by failing to redeem from the partial foreclosure sale (which, remember, occurred *before* the foreclosure sale on the entire property), the redeemer somehow lost his right to redeem from the second sale on the entire property.[52] The redeemer appealed, and the Tenth Circuit certified the question to the Colorado Supreme Court. In an opinion written by Justice Lohr, the Colorado Supreme Court ruled that there was no such waiver.[53]

Exactly how does *Energy Fuels*, which was cited extensively in Justice Lohr's majority opinion, help decide this waiver issue? At first blush, *Energy Fuels* seems entirely inapposite to either of the foreclosure sales in *Sant*. The partial interest which was foreclosed was never redeemed and the entire interest which was foreclosed was redeemed by a junior lienor holding an interest in the entire property. Partial redemption was never an issue in either sale.

Nevertheless, the policies discussed in *Energy Fuels* are at the heart of the dispute in *Sant*, although not in the guise of partial redemption. If we say the junior redeemer in *Sant* waived his right to redeem from the second full sale by failing to redeem from the first partial sale, then what we are really saying is that a lienor with an interest in all of the property *must* redeem from a foreclosure on a partial interest. If we require that, then under certain circumstances of valuation we would be using the property of one co-owner to pay the debts of another, in violation of the sacred principle articulated in *Energy Fuels*.

The majority in *Sant* incanted this principle as a justification for its holding that there was no waiver.[54] Chief Justice Quinn acknowledged this policy in his *Sant* dissent, but asserted the competing policies of "maximizing the price obtained at a foreclosure sale . . . and bringing about certainty and predictability to foreclosure proceedings."[55] Sound familiar? We have in *Sant* the same old battle lines that were drawn in *Energy Fuels*, with the interesting twist that Justice Lohr, the *Energy Fuels* dissenter, is now taking the *Energy Fuels* majority at its word and extending the principles of *Energy Fuels* to the multi-foreclosure situation presented in *Sant*.

If there is anything clear from the two opinions in *Sant*, it is that the court is still struggling with the very difficult issue of when the general policy respecting separate co-ownership of real property gives way to more specific policies related to the foreclosure process.

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52. Sant v. Stephens, 580 F. Supp. 1003 (D. Colo. 1983).

53. 753 P.2d 752 (Colo. 1988).

54. "The district court's holding in this case requires a lienholder on all interests in the property to redeem from a sale of an undivided interest, and this essentially uses the interests of two cotenants to satisfy the creditor of one." *Id.* at 759-60.

55. *Id.* at 763 (Quinn, J., dissenting).

Perhaps an even more striking example of this struggle is the recent court of appeals case of *Pheney v. Western Nat'l Bank*.[56] In that case, the owner of 700 acres of real property, secured by a first deed of trust to Western, divided the acreage into three different parcels and sold each parcel to different buyers. The sales were each subject to the first deed of trust. One of the parcels became encumbered with a second deed of trust for the benefit of M, and another became encumbered with a second deed of trust for the benefit of P.

Western foreclosed and obtained a certificate of purchase for all 700 acres by bidding in the full $525,000 owed to it. M (who, remember, had an interest encumbering only one parcel) gave the public trustee notice of his intent to redeem the entire 700 acres, and tendered the full sales price. P (whose interest also only encumbered one parcel) simultaneously gave notice of his intent to redeem only his 90 acre parcel, and proposed to tender $90,000 for that partial redemption on the theory that the market value of his parcel was only $90,000. The public trustee refused to let P partially redeem and P sued.

The trial court agreed with the public trustee, and the court of appeals affirmed. In its opinion, the court of appeals says several interesting things about *Walker* and *Energy Fuels*, including the statement, rather bold for an intermediate appellate court, that the *Energy Fuels* exception is "facially inconsistent with the statutory requirement that a redeemer must pay the full amount paid at the foreclosure sale."[57]

More particularly, the court of appeals identified two reasons for declining to extend *Energy Fuels* to the situation before it: (1) the competing lienors are not co-owners, since they own separate parcels, and therefore *Energy Fuels*' concerns about having the property of one co-owner pay the debts of the other co-owner do not apply;[58] and (2) to allow partial redemption in this situation requires some determination of the portion to be partially redeemed—that is, presumably some valuation of P's 90 acres as compared with the entire 700 acres.[59]

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56. 762 P.2d 693 (Colo. App. 1988), *cert. denied* October 11, 1988.

57. *Id.* at 695-96.

58.

> While the nature of the interest held by one joint tenant might well mandate that the interest of the other tenant be protected from an involuntary encumbrance, we can discern no comparable consideration where, as here, joint tenants are not involved. On the contrary, in this particular case the encumbrance was voluntarily created with full knowledge that a superior encumbrance had been previously created and foreclosed.

Id. at 696.

59.

> [T]o determine the value of the 90 acres that are encumbered by plaintiff's lien, in comparison to the entire 700 acres foreclosed upon, would require the consideration of evaluation information, which is ofttimes conflicting and contradictory. In our view, a public trustee is ill-equipped to render such evaluation judgments.
>
> Moreover, we can find nothing in the statute that would justify requiring a foreclosing creditor, who purchases at the sale, to be subjected to the peril of such an official's undervaluation of that part of the property for which redemption is sought.

Id.

The court's concerns about the mechanics of valuation are certainly well taken. How is the apportionment between the redeemer's parcel and the entire property to be made? Who is to make this valuation, and on what possible basis? The public trustee cannot make such a determination, nor can the Rule 120 court under the currently simplified procedures. Clearly, the statutory scheme is not structured to handle this valuation inquiry, and to infect the process with this issue would convert almost all foreclosures in which there are partial redeemers into full-blown litigation.[60]

However, the court of appeals' distinction between co-owners of one property and a single owner of multiple parcels is more difficult to understand. As mentioned above, if it is a basic tenet that one co-owner's property not be used to pay another co-owner's debt, then it is also a basic tenet, and perhaps even more basic, that a lien limited to one parcel of A's property does not attach to another of A's parcels, especially when A sells these parcels off to different buyers.[61] For example, in the *Pheney* situation, if P were allowed to redeem the entire 700 acres, if P's debt of $70,000 were greater than his equity in his parcel, and if M were forced to redeem the entire property for $595,000, then the situation is identical to *Energy Fuels*. A's debt to P is being paid with M's collateral.

Perhaps the *Pheney* court is telling us that it simply views *Energy Fuels* as giving more protection to co-owners of one property than to successors of a single owner of multiple parcels. But that message is certainly not clear and its rationale is even less clear. In both situations, junior partial interests are created, voluntarily or involuntarily, after a senior interest in the entire property is in place. In both situations, allowing partial redemption protects one co-owner from having his property used to pay debts of the other co-owners. There does not seem to be any reason why the parcel owner in *Pheney*—who admittedly took title with knowledge of the all-encompassing senior debt, but without knowledge of or control over whether the other owners further encumbered their parcels—should be given any less protection than the husband and wife in *Energy Fuels*—who likewise acquired their joint interests with knowledge that the property was fully encumbered (by the purchase-money mortgage they themselves gave) and with equal inability to control subsequent encumbrancing of the other's undivided interest.

In any event, the one message the court of appeals panel has clearly sent in *Pheney* is that it intends to construe the *Energy Fuels* exception as narrowly as possible.[62]

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60. Of course, where the partial redemption issue arises out of *undivided* co-ownership, as opposed to ownership of divided parcels, this valuation problem is not presented.

61. *See supra* text accompanying notes 7-8.

62. The court of appeals has recently reaffirmed its holding in *Pheney* by summarily dismissing a partial redemption argument in the context of multiple parcels. Describing the *Energy Fuels* exception as applying only to a "joint tenant's undivided interest in the property," the court of appeals has again refused to allow partial redemption of a separate parcel. Stan Miller, Inc. v. Breckenridge Resort Assoc., Inc., 779 P.2d 1365, XIII Brief

CONCLUSION

After considerable and deft waffling on the issue, the supreme court seems to have settled on the general rule that partial redemption is *prohibited* where there are no lienors junior to the partial redeemer in question, but that it is *required* where there are such junior lienors. Although there is some doubt about whether the statutory language allows the court this kind of policy-making, the decision which the court did make in *Energy Fuels* seems to be a sensible accommodation of several complex issues, if one accepts the court's premise that to require full redemption in some circumstances would do an injustice to one of the co-owners.[63] However, that accommodation is by no means complete. For example, is the rule the same for co-owners as it is for owners of separate parcels? Should it depend on whether the junior partial interest was voluntarily or involuntarily created?

It is time for the General Assembly to resolve these questions. As has been suggested, it should probably make no difference whether the partial interest is the result of undivided co-ownership of a single parcel, or multiple ownership of divided parcels. The policy issues in both situations are precisely the same, although if partial redemption is to be permitted in the case of multiple ownership of separate parcels, a valuation mechanism will have to be created.

Nor should it make any difference whether the junior partial interest was created voluntarily or involuntarily. After all, it is the *other co-owner*, the one who did *not* further encumber his interest, who we are purportedly protecting by allowing partial redemption.[64] It should not matter whether his co-owner voluntary or involuntarily encumbered his interest. In either case the rule of *Energy Fuels*, if applied at all, should be applied to prevent one co-owner's property from being used to pay the other's debts, whether or not those debts are secured with consensual or non-consensual liens.

All of this leads to one of two conclusions: either *Energy Fuels* should be abandoned in its entirety, and the no-partial redemption rule of *Walker* applied with no exceptions, or *Pheney* is wrong, and the *Energy Fuels* exception should be applied in any case where there is a redeemer junior to the partial redeemer. It probably matters more that the General Assembly adopt one or the other of these alternatives, and resolve this question, than that it adopt one particular alternative versus the other. If the values of maximizing foreclosure prices and respecting the *Walker* precedent together outweigh the policy against *the mere possibility* of having the property of one co-owner used to pay the debts of another co-owner, and it seems a good legislative case for this proposition can

Times Reporter 237 (Colo. App. 1989). The supreme court granted certiorari on September 11, 1989, and at press time the matter is being briefed.

63. *But see* note 42 *supra* and the text accompanying notes 65-66 *infra*, suggesting that the relative rights and expectations of the co-owners is never an issue by the time a partial redemption is contemplated.

64. *But see* notes 42 and 62 *supra*.

be made, then *Energy Fuels* should be abandoned, and *all* partial redemption should be prohibited. That solution would also avoid the difficult valuation questions which would be created by an extension of the *Energy Fuels* doctrine to the separate parcel situation.

Perhaps the lower courts' reluctance to extend the *Energy Fuels* exception reflects a well-justified skepticism not only with the mechanical problems which wide-spread partial redemption would introduce, but also with its underlying policies.

Is it necessarily true that in the *Energy Fuels* situation the failure to allow a partial redemption would, as the court claimed and even as the dissent acknowledged, cause wife's property to be used to pay husband's debt? No.

Remember, this "inequity" arises only when the value of husband's half interest is not sufficient to pay both the husband's debt and his share of the joint debt. It also arises only after the expiration of the husband and wife's redemption period. If wife wishes to protect her undivided half interest from husband's sole debt, she need only redeem from the foreclosure. Such a redemption would restore completely the equity in her half interest, and keep that equity insulated from husband's sole creditor.

It is thus not accurate at all to say that *Energy Fuels* involved a risk of using wife's property to pay husband's debts. By the time the partial redemption issue was raised in that case, as in any partial redemption case, both husband and wife had already lost all of their equity by failing to redeem. Therefore, the fight there was not between joint owners, but between the joint owners' creditors, namely between their joint creditor on the one hand and husband's creditor on the other.[65] Moreover, the fight is not even about which creditor should be paid in full, since by assumption there is enough value to pay everyone. The fight is over which creditor gets the equity windfall.

It is not at all self-evident that it is "inequitable" to give this windfall to husband's creditor rather than to the joint creditor. On the contrary, in any ordinary foreclosure situation, without the complication of partial redemption, the most junior redeemer *always* has the last chance to acquire any equity windfall because he has the last chance to redeem. There do not appear to be any intrinsic reasons to depart from this rule simply because the junior redeemer's lien happens to encumber only a part of the property.

Moreover, as mentioned above,[66] to permit partial redemption in any circumstance is to subject all lenders to the terrible possibility of having ownership in their collateral split by a junior partial redemption. That prospect certainly will do damage to original lenders' expectations, and will undoubtedly raise the cost of jointly borrowed purchase money.

In addition to these policy difficulties, partial redemption raises

65. *See supra* note 42.
66. *See supra* text accompanying notes 46-47.

many mechanical problems not yet addressed by the cases. For example, what if *both* co-owners have individual partial creditors, and *both* partial creditors wish to redeem their partial interests from a foreclosure of the whole? How is this situation complicated further if there is a lienor junior to both of them, but whose lien encumbers the whole? Exactly what are the applicable redemption periods, and when do they run?[67]

Unless and until the legislature acts, considerable controversy will remain over where the no-partial-redemption rule ends and its exception begins. In the end, perhaps the best way to resolve this difficulty is for the General Assembly to eliminate the *Energy Fuels* exception entirely and to return the law of foreclosure to the predictable and long-standing rule of no partial redemption.

67. The most senior junior lienor has ten days to redeem, followed by subsequent lienors each with five days. *See supra* text accompanying notes 15-20. If partial redemption is allowed, then lienors may be senior as to one undivided half of the property, but junior as to the other, requiring the public trustee to keep track of parallel sets of redemption periods.

IN THE INTEREST OF R.C., MINOR CHILD: THE COLORADO ARTIFICIAL INSEMINATION BY DONOR STATUTE AND THE NON-TRADITIONAL FAMILY

I. INTRODUCTION

Artificial insemination[1] is modern reproductive technology's oldest[2] and most common technique.[3] It has long been used as an alternative to adoption, to treat infertility, to prevent the transmission of genetic defects or diseases, and to overcome physical limitations that make intercourse impossible.[4] Artificial insemination by donor ("AID")[5] has a confusing and inconsistent legal history.[6] Currently, only thirty-one states have passed legislation governing AID.[7] Typically this legislation addresses only the most traditional factual situation: where a woman (1) is inseminated by a physician; (2) with the sperm of an anonymous donor; (3) after first obtaining her husband's consent.[8]

There are many variations of this traditional scenario. For example, the AID recipient may be unmarried, and she may intend to remain a single parent. Or she may wish to self-inseminate in the privacy of her home. Additionally, the recipient may prefer to obtain the semen from a

1. Artificial insemination is a method of conception in which a woman is impregnated by an injection of semen into her vagina, cervical canal or uterus.

2. The earliest artificial insemination in a human was performed in 1790 by John Hunter, a Scottish surgeon. Kern & Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right To Be a Single Parent Through Artificial Insemination by Donor*, 7 Women's Rts. L. Rep. 251, 252 n.4 (1982). However, there are indications that the possibilities of artificial insemination were considered by the Hebrews as long ago as 220 A.D. Note, *Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients*, 26 J. FAM. L. 793, 794 (1987-88) (citing W. FINEGOLD, ARTIFICIAL INSEMINATION 5 (1964)).

3. It is difficult to provide completely accurate figures on the use of artificial insemination in the United States because doctors have not had to report this procedure, are reluctant to keep records of their work, or are unwilling to release this information in the interest of donor anonymity. *See* Note, *The Need for Statutes Regulating Artificial Insemination by Donors*, 46 OHIO ST. L.J. 1055, 1056 (1985). An estimate is that there are 20,000 artificially inseminated children born each year, of which 1,500 are born to unmarried women. Vetri, *Reproductive Technologies and United States Law*, 37 INT'L & COMP. L.Q. 505, 507 (1988); Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 671 (1985). An estimated 250,000 people in the Unites States alone have been conceived by artificial insemination, and it has been projected that an additional 1.5 million children will be conceived through this procedure by the end of the century. Comment, *The Need for Regulation of Artificial Insemination by Donor*, 22 SAN DIEGO L. REV. 1193, 1194 (1985).

4. *See* Kritchevsky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L. J. 1, 2 (1981); Comment, *supra* note 3, at 1196.

5. Artificial insemination may be performed in three ways: AID, where the sperm from a donor is used; AIH, artificial insemination by husband, where the recipient's husband is the sperm donor; and AIC, where semen from the husband and an unrelated donor are combined. Comment, *Artificial Insemination and Surrogate Motherhood — A Nursery Full of Unresolved Questions*, 17 WILLAMETTE L. REV. 913, 916-18 (1981).

6. Note, *supra* note 2, at 793.

7. *See* Patt, *A Pathfinder on Artificial Insemination*, 8 LEGAL REFERENCE SERVS. Q., 117, 123-30 (1988).

8. Bishop, *The Brave New World of Baby Making*, 6 CAL. LAW. 37, 38 (Aug. 1986).

known donor. Finally, the donor, married or unmarried, may be the party seeking parental rights.

The existing AID legislation does not provide clear guidelines for all parties involved in these non-traditional situations.[9] To a great extent, the legal rights and obligations of the parties involved in these non-traditional situations have not been judicially resolved.

This Comment explores the current legal status in Colorado of AID procedures involving known semen donors and unmarried recipients. Specifically, this Comment focuses on the recent Colorado Supreme Court decision, *In the Interest of R.C., Minor Child*,[10] and the court's interpretation of Colorado's AID statute.[11]

This Comment initially reviews the Colorado AID statute. It then reviews the facts of the instant case and the reasoning employed by the court. Next, it analyzes the holding in terms of its legal and practical effects on unmarried recipients and known donors. Finally, this Comment suggests a statutory solution to help resolve the present uncertainty regarding the legal ramifications of AID involving unmarried recipients and known donors.

II. COLORADO AID STATUTE

Colorado's AID statute is found in § 19-4-106, 8B C.R.S. (Supp. 1988) of the Colorado Uniform Parentage Act ("Colorado UPA"). Section 19-4-106 provides:

> 19-4-106. ARTIFICIAL INSEMINATION.
>
> (1) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination and shall file the husband's consent with the department of health, where it shall be kept confidential and in a sealed file; however, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> (2) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.[12]

This statute is based on section 5 of the Model Uniform Parentage

9. Note, *supra* note 2, at 793.
10. 775 P.2d 27 (Colo. 1989).
11. COLO. REV. STAT. § 19-4-106 (Supp. 1988).
12. *Id.*

Act ("Model UPA")[13] as approved by the National Conference of Commissioners on Uniform State Laws in 1973. Colorado adopted its version of the Model UPA in July 1977 with the passage of House Bill No. 1584.[14] The stated purpose of the Colorado UPA was to codify most common law presumptions concerning paternity and to establish procedures for the bringing of an action to determine the existence of a father and child relationship.[15]

With the exception of the omission of the word "married" in subsection (2),[16] § 19-4-106 is a verbatim reproduction of section 5 of the Model UPA. There is nothing in the legislative tapes or files which indicates why the Colorado General Assembly omitted the word "married" from subsection (2) when the bill was originally introduced.

III. INSTANT CASE

A. *Facts*: In the Interest of R.C., Minor Child[17]

In 1985, J.R., an unmarried man, donated semen to E.C., an unmarried woman he had known since 1983. E.C. used a licensed physician to inseminate her, became pregnant and bore a child, R.C., in 1986.

Shortly after the child was born, E.C. told J.R. that § 19-4-106(2) extinguished his right to be treated as the father of R.C. Within a few months J.R. instituted a paternity action alleging that, at the time of his donation of semen, he and E.C. had agreed that J.R. would be treated as the father of any child so conceived.

In his petition, J.R. alleged that E.C. had solicited the donation of his semen; that he donated the semen only because E.C. promised that J.R. would be treated as the natural father of any child conceived by the artificial insemination; that there had been financial and emotional involvement by him before and after the birth of R.C.; that E.C. knew of and encouraged J.R.'s conduct; and that he intended to retain a parental relationship with R.C. at the time J.R. donated his semen.[18]

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13. The Model UPA was enacted in 1973 largely in response to United States Supreme Court decisions regarding the rights of unmarried parents and their offspring. Note, *supra* note 2, at 796. The Model UPA's aim is to equalize the rights of legitimate and illegitimate children, and its provisions are applicable regardless of the marital status of the parents. *See* UNIF. PARENTAGE ACT, Commissioners' Prefatory Note, 9B U.L.A. 287 (1987).

14. Ch. 245, §§ 1-3, §§ 19-6-101 to -129, 1977 Colo. Sess. Laws 1010, 1011-12 (now codified at §§ 19-4-101 to -129, 8B C.R.S. (Supp. 1988)). The portion of House Bill No. 1584 dealing with AID was introduced and passed without change using language identical to the present § 19-4-106. When adopted, the Colorado AID statute was numbered § 19-6-106. The general assembly repealed and reenacted § 19-6-106 in 1978 and 1987. It was renumbered in 1987 and can be found in the 1988 Supp. as § 19-4-106. *See* 775 P.2d at 31.

15. *Uniform Parentage Act: Hearing on H.B. 1584 Before the House Judiciary Committee*, 51st G.A., 1st Sess. (1977) (statement of Rep. Eckelberry).

16. Model UPA § 5(2) provides: "The donor of semen provided to a licensed physician for use in artificial insemination of a *married* woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." (emphasis added).

17. 775 P.2d 27 (Colo. 1989).

18. J.R. additionally alleged that he had always wanted to be a father; that when he

E.C. denied all of J.R.'s allegations and filed a motion for summary judgement, contending that § 19-4-106(2) extinguished whatever rights J.R. might have claimed as the biological father. E.C. argued that because the statutory prerequisites were met,[19] J.R. must be treated in law as if he were not the natural father of R.C. She claimed that evidence surrounding any agreement of the parties at the time he donated the semen was legally irrelevant because § 19-4-106 did not provide for consideration of such evidence.[20]

In his response, J.R. claimed that § 19-4-106(2) does not apply to known semen donors and unmarried recipients who mutually agree that the donor would retain his status as legal father of any child conceived through AID. He argued that evidence surrounding the agreement between J.R. and E.C. at the time of AID was relevant under the common law theory of promissory estoppel. He further argued that if § 19-4-106(2) renders evidence surrounding the agreement of the parties irrelevant, then the statute as applied would violate the equal protection and due process clauses of the state and federal constitutions.[21]

The Juvenile Court, City and County of Denver, expressly found the statute constitutional and concluded that, regardless of any agreement, the statute extinguished any right J.R. may have had to be treated as the father of R.C.[22] The court did not address J.R.'s promissory estoppel claim.[23]

J.R. appealed to the Colorado Court of Appeals. Because of the public importance of the issues presented, the appeal was transferred from the court of appeals to the supreme court pursuant to Colorado Appellate Rule 50(a)(3).[24]

The Colorado Supreme Court, in a majority opinion authored by Justice Vollack, held that an agreement between a known semen donor and an unmarried recipient at the time of artificial insemination is relevant in determining the donor's parental rights with respect to a child so conceived, despite the existence of a statute which normally cuts off the parental rights of semen donors.[25] Accordingly, the case was remanded for a hearing on the evidence surrounding the issue of an agreement.[26]

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learned E.C. was pregnant, he bought clothing, toys and books for R.C.; that he opened a college trust fund for R.C. and furnished a room in his house as a nursery; that he provided for R.C. in the event of his (J.R.'s) death; that he attended birthing classes with E.C.; that he was a guest of honor at E.C.'s baby showers; that he assisted in the delivery of R.C.; that he occasionally handled night feedings of R.C.; and that he took care of E.C. and R.C. on a daily basis during the first week of R.C.'s life. *Id.* at 28.

19. J.R. had conceded in his pleadings that he was a donor of semen, that E.C.'s gynecologist was a licensed physician, that he was not married to E.C., and that he provided semen for use in E.C.'s artificial insemination. *Id.*

20. *Id.*

21. *Id.* at 28-29.

22. *Id.* at 29.

23. *Id.*

24. C.A.R. 50(a)(3) (1984).

25. 775 P.2d at 35.

26. *Id.*

B. *Reasoning*

1. Majority Opinion

According to the majority, the issue as presented was whether an agreement between a known donor and unmarried recipient that the donor would be the natural father of the child conceived through artificial insemination is a relevant consideration in determining parental rights under § 19-4-106.[27] The court resolved the case on the basis of statutory interpretation[28] and therefore declined to address the common law and constitutional issues.[29] In reaching its decision, the court looked to the AID statute of the Model UPA, the legislative history of Colorado's AID statute, legal commentaries analyzing the rights of parties in AID, and cases concerning AID involving known donors and unmarried recipients.

The court first considered the role of an agreement as contemplated by the Model UPA. In reviewing the AID section of the Model UPA, the court noted that section 5 of the Model UPA was never intended to answer all questions concerning the rights of participants in artificial insemination.[30] The commentary to section 5 states:

> This Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination. It was though [sic] useful, however, to single out and cover in this Act at least one fact situation that occurs frequently. Further consideration of other legal aspects of artificial insemination has been urged on the National Conference of Commissioners on Uniform State Laws and is recommended to state legislators.[31]

The court determined that section 5 of the Model UPA resolves the specific legal conflict between a semen donor and the recipient's husband.[32] Consistent with the core premises of the Model UPA,[33] the court stated that the drafters of the Model UPA plainly envisioned that an agreement between the donor and a married recipient regarding the donor's parental rights would be irrelevant because the married recipient's husband is treated in law as if he were the natural father.[34] The court also recognized that, as a practical matter, an agreement would not be a relevant consideration when the semen donor is anonymous.[35]

The court decided, however, that both section 5 of the Model UPA and § 19-4-106 fail to provide statutory definition of the rights and du-

27. *Id.* at 33.
28. *Id.* at 35.
29. *Id.*
30. *Id.* at 30.
31. UNIF. PARENTAGE ACT § 5, Commissioners' Comment, 9B U.L.A. 302 (1987).
32. 775 P.2d at 30.
33. *See* Donovan, *The Uniform Parentage Act and Nonmarital Motherhood-By-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193, 217 (1982-83).
34. 775 P.2d at 33.
35. *Id.*

ties of the parties outside of the married recipient context.[36] It therefore concluded that § 19-4-106 is ambiguous in this respect.[37]

The court acknowledged the debate over the issue of whether section 5 of the Model UPA was intended to extinguish parental rights of semen donors known to the recipient. It observed that a number of legal commentaries have suggested that the intent of the known donor and unmarried recipient should be relevant to a determination of parental rights under the Model UPA.[38]

The court next considered decisions from other jurisdictions to gain insight into the role of an agreement in determining parental rights of known semen donors and unmarried recipients involved in artificial insemination. Prior to the instant case, only two jurisdictions had determined the rights of known donors and unmarried recipients concerning children conceived through AID.[39] The court noted that in both cases the intent of the parties was a relevant consideration in determining whether the known donor's parental rights were extinguished.[40]

The first case, *C.M. v. C.C.*,[41] was decided in 1977, before the state of New Jersey enacted an AID statute. That case involved a known donor giving semen to an unmarried recipient who artificially inseminated herself without the aid of a licensed physician. The court determined that the donor had intended to act as a parent and that when the child was conceived there was no other party in a position to take on the responsibility of fatherhood.[42] Relying on public policy that it was in "the child's best interest to have two parents whenever possible,"[43] the court concluded that the donor was entitled to visitation rights with respect to the resulting child.[44]

The more recent case, *Jhordan C. v. Mary K.*,[45] involved the interpretation in 1986 by the California Court of Appeal of an AID statute[46] identical to § 19-4-106. There the court determined that, unlike the Model UPA, the California AID statute applies to unmarried recipients.[47] However, it concluded that because the recipient did not obtain the semen directly from a licensed physician as required by statute, the statute did not apply and therefore the donor was not precluded from

36. *Id.* at 34.

37. *Id.*

38. *See* Andrews, *Legal Aspects of New Reproductive Technologies*, 29 CLINICAL OBSTETRICS & GYNECOLOGY 190, 200 (1986); Kern & Ridolfi, *supra* note 2, at 256; Vetri, *supra* note 3, at 514; Note, *supra* note 2, at 806; *see also* In Re Marriage of Adams, 174 Ill. App. 3d 595, 610-11, 528 N.E.2d 1075, 1084 (1988); Andrews, *Legal Aspects of Assisted Reproduction*, 54 ANNALS N.Y. ACAD. SCI. 668, 674 (1988).

39. 775 P.2d at 31-32.

40. *Id.* at 34.

41. 152 N.J. Super. 160, 377 A.2d 821 (1977).

42. *Id.* at —, 377 A.2d at 824.

43. *Id.* at —, 377 A.2d at 825.

44. *Id.* at —, 377 A.2d at 825.

45. 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986).

46. CAL. CIV. CODE § 7005(b) (West 1983).

47. 179 Cal. App. at 392, 224 Cal. Rptr. at 534.

establishing paternity.[48]

Based upon these cases and its review of legislative history and legal commentaries, the Colorado Supreme Court stated that:

> The primary purpose of § 19-4-106 is to provide a legal mechanism for married and unmarried recipients to obtain a supply of semen for use in artificial insemination and, in the case of married recipients, to make clear that the legal rights and duties of fatherhood are borne by the recipient's husband rather than the donor.[49]

The court agreed with the *Jhordan C.* court that an unmarried woman does not lose the protection of the AID statute merely because she knows the donor,[50] and that the AID statute protects semen donors from unanticipated child support obligations.[51] However, the court concluded that the general assembly neither considered nor intended to affect the rights of known donors who gave their semen to unmarried recipients for use in AID with an agreement that the donor would be the father of any child so conceived. The court thus held the AID statute inapplicable in this circumstance.[52]

Because the court concluded that § 19-4-106 does not apply when the known semen donor and the unmarried recipient agree that the known donor will have parental rights and expressly agree at the time of insemination that he will be treated as the natural father of any child so conceived, it held that an agreement is relevant to whether J.R.'s parental rights were extinguished through the artificial insemination process.[53] The court held that if no such agreement was present at the time of insemination, then § 19-4-106(2) would operate to extinguish J.R.'s parental rights and duties concerning R.C. Conversely, if such an agreement was present, then § 19-4-106(2) would not operate to extinguish J.R.'s parental rights and duties concerning R.C., and the juvenile court must determine parental rights based on the terms of the agreement.[54]

2. Concurring Opinion

Justice Kirshbaum filed a special concurrence.[55] He disagreed with the majority's suggestion that the issue was whether the general assembly intended § 19-4-106(2) to apply to a donor who had an agreement with the donee that, contrary to the statute's provisions, the donor should be treated as the child's father. He stated that such an interpretation could suggest that the meaning of statutory terms can vary depending on private agreements and that legislative intent could therefore vary from case to case depending on the frame of mind of

48. *Id.* at 398, 224 Cal. Rptr. at 537-38.
49. 775 P.2d at 30.
50. *Id.* at 35.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* (Kirshbaum J., concurring).

persons governed by that intent.[56] He phrased the issue as whether parties whose rights are governed by statute may waive those rights by agreement.[57]

Justice Kirshbaum also did not accept the majority's suggestion that the drafters of the Model UPA envisioned that the only time an agreement by the parties would not be a relevant consideration in ascertaining the meaning of the statute is when the donee is married and her husband consents in writing to the artificial insemination.[58] He reasoned that if the meaning of a statute in some but not all of its applications must be determined by reference to the intent of persons governed thereunder, the statute may not meet equal protection or due process standards.[59]

It was Justice Kirshbaum's opinion that subsection (2) of the statute must be read in conjunction with subsection (1), which requires that the artificial insemination statute be committed to the supervision of a licensed physician.[60] Noting that the general assembly did not define the scope of supervision required of the licensed physician in the AID process, he reasoned that a common law standard of reasonable professional care is implied.[61] He stated that if the artificial insemination of E.C. was not properly supervised by a licensed physician as contemplated by subsection (2), the statute would not apply to bar J.R. from establishing the existence of an agreement. Because the trial court did not consider the question of adequate physician supervision, he would have remanded the case for such a determination.[62]

IV. Analysis

Section 19-4-106(2) provides that the (1) donor of semen, (2) provided to a licensed physician, (3) for use in artificial insemination, (4) of a woman other than the donor's wife, (5) is treated in law as if he were not the natural father of any child so conceived.[63]

The plain language of the statute seems to contemplate the situation involving a known donor and unmarried woman. Nonetheless, the supreme court concluded that the legislature never intended to address this situation and found subsection (2) ambiguous in the context of a known donor and unmarried woman.[64] The court went on to conclude that unmarried as well as married women share in the protection provided by subsection (2) and that known donors are protected under subsection (2) from unanticipated child support obligations.[65] However,

56. *Id.* at 35-36 (Kirshbaum J., concurring).
57. *Id.* at 36 (Kirshbaum J., concurring).
58. *Id.* (Kirshbaum J., concurring).
59. *Id.* (Kirshbaum J., concurring).
60. *Id.* (Kirshbaum J., concurring).
61. *Id.* at 37 (Kirshbaum J., concurring).
62. *Id.* (Kirshbaum J., concurring).
63. *See supra* text accompanying note 12.
64. *See supra* text accompanying notes 36-37.
65. *See supra* text accompanying notes 50-51.

the court ruled that subsection (2) was never intended to affect the rights of known donors when there is an agreement covering the donor's parental rights regarding a child so conceived.[66]

There is nothing evident in the plain language of the statute to support the court's conclusion that the general assembly intended to distinguish between known and unknown donors. Moreover, there is nothing in subsection (2) that refers to the effect an agreement would have on the application of the statute. To rationalize looking beyond the plain language of the statute, the court recites one legal commentary's statement of the core policy considerations of the Model UPA: guaranteeing substantive legal equality for all children as well as identifying the father and enforcing the child's rights against him.[67] The court appears to have focused on the latter part of these stated policy considerations: identifying the father and enforcing the child's rights against him.

Perhaps the court was troubled that neither the statutory language nor legislative history specifically address the rights of known donors, and that if the word "donor" is construed as known or unknown, application of the plain language of the statute would result in the elimination of any possibility of a man acquiring parental rights outside of wedlock. Such a result would run contrary to caselaw existing prior to the Model UPA[68] and could be unconstitutional.[69]

The decision of the court, however, does not clarify the rights and duties of an unmarried recipient and a known donor. Under the court's holding, by asserting that there was a pre-insemination agreement, a known donor can always bring a custody suit against a mother, and an unmarried mother can always bring a child support action against a known donor. As a practical consequence of the court's ruling, in every action brought by either a known donor or an unmarried mother, the party seeking to avoid application of the statute will be able to preclude summary judgment by asserting the existence of a pre-insemination agreement. Therefore, such cases will invariably go to trial, unnecessarily involving the court's time and increasing the costs to the parties. The court's statement that unmarried women are protected under the statute[70] falters under the practical application of its holding.

The Colorado Supreme Court stated that the purpose of § 19-4-106 is to provide a mechanism for all women to obtain a supply of semen for use in artificial insemination.[71] However, the court's holding has a questionable impact on the artificial insemination process in regard to both unmarried women and known donors. Because of the possibility of litigation, unmarried women may be reluctant to be artificially insemi-

66. *See supra* text accompanying notes 52-54.

67. 775 P.2d at 33; *see* Donovan, *supra* note 33, at 217.

68. *See* UNIF. PARENTAGE ACT, Commissioners' Prefatory Note, 9B U.L.A. 287-90 (1987).

69. *Id.*

70. *See supra* text accompanying note 50.

71. *See supra* text accompanying note 49.

nated and men may be reluctant to be known donors. This chilling effect would undermine many of the purposes of Colorado's AID statute.

In situations where AID involves an unmarried recipient and known donor, the increased occurrence of litigation seems unavoidable. To remedy this situation, a legislative amendment to Colorado's AID statute must be made to clarify the rights and duties of all parties involved. The statute should state that the donor has no rights or duties to the child unless the parties agree otherwise in writing. The written agreement could be filed with the physician performing the AID, similar to the present subsection (1) requirement regarding filing and maintaining of records pertaining to the insemination of a married woman and her husband.[72] This would protect the unmarried mother from defending an unanticipated paternity action and the known donor from defending an unanticipated child support action.

A similar approach has been adopted in the states of New Jersey[73] and Washington.[74] For example, New Jersey's AID statute, § 9:17-44(b) provides that "unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived . . . ."[75] While this language severs the legal relationship between the unmarried recipient and known donor when there is no written agreement, it also allows an unmarried woman and known donor to agree that the donor will have a role as a father, and provides for rights and responsibilities of the parties.[76]

Modifying subsection (2) of Colorado's AID statute to include the requirement of a written contract would serve to ensure that both the recipient and donor, when the provisions of the statute are met, would be protected against future intervention by a party desiring to redefine his or her rights and obligations.[77] Parties who enter into a pre-insemination contract would be held to the terms of that contract.

This contract approach is not without inherent uncertainty. Both the California Court of Appeal in *Jhordan C.*[78] and Justice Kirshbaum in his concurrence in the instant case[79] recognized the questionable enforceability of such an agreement between the parties. However, the enforceability of a contract in an AID situation is analogous to the enforceability of a contract in an adoption situation. Just as the biological parents are not permitted to change their minds after they have exe-

72. *See supra* text accompanying note 12.

73. N.J. STAT. ANN. § 9:17-44(b) (West Supp. 1989).

74. WASH. REV. CODE § 26.26.050(2) (1986).

75. *Supra* note 73. It is noteworthy that this AID statute was passed by the New Jersey General Assembly subsequent to the decision by the New Jersey Superior Court in the case of C.M. v. C.C., *supra* note 41.

76. *See* Vetri, *supra* note 3, at 515.

77. *See* Kritchevsky, *supra* note 4, at 40-41; Note, *supra* note 2, at 808.

78. 179 Cal. App. at 396, 224 Cal. Rptr. at 536.

79. 775 P.2d at 37 (Kirshbaum J., concurring).

cuted a waiver of their rights at the time of adoption,[80] neither should the parties in AID be permitted to change their minds after insemination. A post-insemination repudiation of the contract would be to the detriment of all parties involved. Subsequent controversies over custody, visitation, support and such matters as the child's education and religion might disrupt the lives of the child and all members of the planned family.

A modification to Colorado's AID statute would clarify the legal rights and duties of all parties in the AID situation. Furthermore, it would be a tacit recognition by the legislature that it is not always in the best interest of a child to have two parents. Moreover, it would serve the core policy considerations of the UPA.

V. CONCLUSION

For Colorado's AID law to remain relevant to today's society, it must progress as society progresses. By adding the element of an agreement, the Colorado Supreme Court has limited the application of Colorado's AID statute. This change leaves § 19-4-106 with the narrow application recognized by the Model UPA drafters as an inherent limitation of section 5 of the Model UPA.[81] It leaves uncertain the legal status of unmarried recipients, known donors and their offspring.

There are many variations to the traditional family scenario. The laws of Colorado must recognize these alternate lifestyles and keep pace with the demands of modern reproductive technology. It is undeniable that numerous unmarried recipients and known donors participate in the AID procedure, most likely unaware of the potential legal ramifications associated with it. To avoid confusion over the rights and duties of these parties and to serve the core policy considerations of the Model UPA, the Colorado General Assembly must act. The rights and duties of unmarried recipients and known donors involved in the AID process must be delineated.

Elizabeth A. Bryant

80. *See* Note, *supra* note 2, at 805.
81. *See supra* text accompanying notes 31-36.

TESTING GOVERNMENT EMPLOYEES FOR DRUG USE: THE UNITED STATES SUPREME COURT APPROVES

INTRODUCTION

Over the past decade, there has been a massive national movement against drug use. On September 15, 1986, President Reagan openly declared a war on the use of drugs in the workplace by signing Executive Order Number 12,564.[1] The Order mandates drug testing[2] of federal employees in "sensitive positions"[3] and requires each agency of the Executive Branch to adopt a policy regarding drug use.[4] This action was later followed by the implementation of the Drug-Free Workplace Act of 1988.[5] Additionally, both the Department of Defense[6] and Department of Transportation[7] have promulgated anti-drug rules and regulations.

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1. 3 C.F.R. §§ 100, 101 at 224 (1986).

2. The testing is for illegal "narcotic drugs" as that term is defined by the Controlled Substances Act, 21 U.S.C. § 802 (Supp. V. 1987). The term illegal "narcotic drugs" does not include the use of a controlled substance pursuant to a valid prescription. 5 U.S.C. § 7301 (Supp. V 1987). The mandatory guidelines for federal workplace drug testing programs was promulgated by the Secretary of Health and Human Services. 53 Fed. Reg. 11,970-89 (April 11, 1988).

3. "Sensitive" positions include those with access to classified information, presidential appointees, law enforcement officers, positions dealing with national security, and "other functions requiring a high degree of trust and confidence." 3 C.F.R. §§ 100, 101 at 229 (1986).

4. *Id.*

5. 41 U.S.C. A. §§ 701-706 (West Supp. 1989). The Act requires that in order for an employer to be awarded a federal contract or grant of $25,000 or more, he must certify that he will provide a drug-free workplace by: (1) establishing a statement notifying employees about the prohibition of controlled substances in the workplace, and the sanctions imposed for such a violation; (2) establishing a drug-free awareness program; (3) providing a copy of the statement to each employee; (4) notifying the employee that his employment is conditioned upon his abiding by the statement and that the employee must notify the employer within five days of a drug statute conviction for a violation occurring in the workplace; (5) notifying the contracting or granting agency within ten days after receiving notice of an employee drug statute conviction; (6) imposing a sanction on the convicted employee or require his participation in a drug abuse assistance or rehabilitation program; and (7) making a good-faith effort to maintain a drug-free workplace. *See id.* at § 701.

6. 53 Fed. Reg. 37,763 (1988) (to be codified at 48 C.F.R. § 223). Employers entering into a contract with the Department of Defense ("DOD") must certify their intention to maintain a drug-free workplace. The employer must agree to provide for: (1) an employee assistance program which includes drug education, counseling and rehabilitation; (2) training for supervisors to detect drug abuse; (3) a referral system, including both self and supervisory referrals, for substance abuse treatment; and (4) procedures for identifying illegal drug users. The DOD regulations also mandate drug-testing for employees in "sensitive positions." Generally, "sensitive positions" include those having access to classified material or those requiring a "high degree of trust and confidence" due to national security concerns. The DOD regulations do not specify when drug testing must be conducted — i.e., applicant screening, post-accident, etc. It is up to the employer to determine the extent and criteria for testing. The DOD rules generally do not apply to contracts for commercial goods or contracts performed outside the United States, nor do they apply if they conflict with state or local law or existing collective bargaining agreements. *Id.*

7. 53 Fed. Reg. 47,002 (1988) (to be codified at 49 C.F.R. § 40). Employees of private and public transportation companies and employees in safety-sensitive or security-related jobs must also be tested under the Department of Transportation ("DOT") rules.

Admittedly, drug use in this country is a real and dangerous problem. A study conducted by the National Institute on Drug Abuse concluded that between 10% and 23% of all workers abuse drugs on the job.[8] Additionally, according to the Alcohol, Drug Abuse, and Mental Health Administration, in 1986 alcohol and drug abuse cost industries up to $100 billion in lost productivity, caused three times more absenteeism and five times more workers' compensation claims.[9] The fact that drug use is a devastating problem is not disputed. The real issue is what means may constitutionally be used to detect such use. While mandatory drug testing seems to be an attractive solution, it may open a Pandora's box of legal and ethical considerations. Two recent Supreme Court decisions[10] explored the constitutionality of drug testing programs in both the Federal Railroad Administration ("FRA") and the United States Customs Service ("Customs Service"). In both cases, the Court held that the government's testing of employees in law enforcement and safety-sensitive jobs did not violate the fourth amendment's prohibition against unreasonable searches and seizures.[11] Neither of the programs conditioned their test requirements upon the production of a warrant or the presence of individualized suspicion.

Although drug testing has been prevalent in the government sector[12] for nearly a decade,[13] some level of individualized suspicion has

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The regulations apply to industries regulated by the Federal Aviation Administration, Federal Railroad Administration, Federal Highway Administration, Urban Mass Transit Transportation Administration, the United States Coast Guard, and Research and Special Projects Administration. The industries must conduct random drug testing of employees in safety or security-related positions for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine ("PCP"). Employers are required to develop and maintain clear, well-defined procedures for collecting and analyzing urine specimens. The tested workers must be given written instructions regarding their responsibility to provide a urine sample. Test results are reviewed by the employer's medical officer. If an employee tests positive, he must be given an opportunity to respond. The DOT rules, unlike DOD rules, preempt state and local laws and collective bargaining agreements. In addition to the DOT regulations, each administration operating under the DOT may promulgate their own rules. *Id.*

See infra notes 70-77 and accompanying text for further discussion of the Federal Railroad Administration regulations.

8. D. COPUS, MATTERS OF SUBSTANCE: ALCOHOL AND DRUGS IN THE WORKPLACE (2d ed. 1987).

9. *Id.* at 6.

10. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989), *rev'g* 839 F.2d 575 (9th Cir. 1988); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).

11. The fourth amendment provides:

> The right of all people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

12. This note is concerned only with governmental testing programs. For a discussion of drug testing by private employers see Note, *Employee Drug Testing-Issues Facing Private Sector Employers*, 65 N.C.L. REV. 832 (1987). For a discussion of issues relating to private employers that have been awarded federal contracts or grants see D. COPUS, ALCOHOL AND DRUGS AT WORK: A MANUAL FOR FEDERAL CONTRACTORS AND GRANTEES (1989).

generally been required.[14] This note will focus on historical fourth amendment analysis, the significance of the *Skinner* and *Von Raab* decisions regarding other drug testing programs, and will attempt to reconcile such programs with the fourth amendment.

I. BACKGROUND

A. *Fourth Amendment Analysis*

The essential purpose of the fourth amendment is to safeguard the privacy and security of individuals against arbitrary and unreasonable intrusions by the government.[15] This right has been recognized as one which is "basic to a free society."[16]

Specifically, the fourth amendment protects against two types of intrusions — "searches" and "seizures."[17] A search is an infringement on an expectation of privacy[18] that society is prepared to consider reasonable.[19] A seizure of property occurs when there is a "meaningful interference with an individual's possessory interest in that property."[20] Although courts have historically applied fourth amendment protections only to intrusions of property, this right has been extended to protect a person's physical integrity as well.[21]

The fourth amendment does not prohibit all searches and seizures, only those which are "unreasonable."[22] Except for a few well-defined exceptions, a constitutional search requires the procurement of a warrant based upon a showing of probable cause.[23]

A central question in fourth amendment cases, therefore, is to determine whether the search was "reasonable." If the search was conducted pursuant to a warrant, it is presumed to be reasonable because a neutral magistrate has objectively evaluated its reasonableness in advance to protect individual privacy interests.[24] A more difficult question arises when a warrantless search has been conducted.

The Supreme Court has attempted to define what is "reasonable:"

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13. *See* Note, *Random Drug Testing in the Government Sector: A Violation of Fourth Amendment Rights?*, 62 TUL. L. REV. 1373, 1374 (1988).

14. *See* McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029; Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

15. *See* Delaware v. Prouse, 440 U.S. 648 (1979); Camara v. Municipal Court, 387 U.S. 523 (1967); Schmerber v. California, 384 U.S. 757 (1966).

16. *Schmerber*, 384 U.S. at 767 (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).

17. United States v. Jacobsen, 466 U.S. 109 (1984).

18. The "expectation of privacy" doctrine was developed in Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring); *see also infra* notes 27-30 and accompanying text.

19. *Jacobsen*, 466 U.S. at 113.

20. *Id.*

21. *Katz*, 389 U.S. at 351. "The fourth amendment protects people, not places." *Id.*

22. Security & Law Enforcement Employees v. Carey, 737 F.2d 187, 201 (1984) (quoting Carroll v. United States, 267 U.S. 132, 147 (1925)).

23. O'Connor v. Ortega, 480 U.S. 709, 720 (1987); *Katz*, 389 U.S. at 356; Camara v. Municipal Court, 387 U.S. 523, 529-30 (1967).

24. Terry v. Ohio, 392 U.S. 1, 21 (1968).

> The test of reasonableness under the fourth amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating, and the place in which it is conducted.[25]

The determination of "reasonableness" therefore involves balancing the government's interests against the intrusiveness of the search on the individual's fourth amendment rights.[26]

The intrusiveness of the search must be viewed in the context of the individual's expectation of privacy.[27] First, a person must have an actual, *subjective* expectation of privacy. Second, the expectation must be one that society finds reasonable. A further determination of reasonableness is then made by looking at whether the search was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the intrusion in the first place.[28] Whether the search was justified at its inception requires a balancing of the individual's expectation of privacy with the governmental interest which allegedly justified the intrusion. To justify the search, the government must be able to point to specific and articulable facts, together with rational inferences judged against an objective standard — i.e., would a reasonable person have thought the action appropriate?[29] Anything less would be a "hunch" and constitute an unreasonable intrusion on fourth amendment rights.[30]

Although the government is generally required to obtain a warrant based upon probable cause before it may conduct a search,[31] probable cause is not an "irreducible requirement" of a valid search.[32] In certain circumstances, warrantless searches are valid even though suspicion did not rise to the level of probable cause.[33] These exceptions are based on the "special needs" of the government (the "Special Needs Exception"). Both warrant and probable cause requirements are dispensed with when "special needs, beyond the need for law enforcement, . . .[make them] impracticable."[34] These cases are generally rationalized by exigent circumstances,[35] such as the risk that evidence will be destroyed while a

25. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

26. Although the fourth amendment technically applies only to the federal government, its application has been extended to the states through the due process clause of the fourteenth amendment. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

27. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

28. *Terry*, 392 U.S. at 20.

29. *Id.* at 21.

30. *Id.* at 22; *see also* Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982).

31. *See supra* note 23.

32. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

33. *Id.*; *see also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Terry v. Ohio, 392 U.S. 1 (1968).

34. *T.L.O.*, 469 U.S. at 351 (Blackman, J., concurring).

35. Such exceptions include the "automobile exception," hot pursuit, stop and frisk, plain view, border searches, administrative searches of closely regulated industries, inven-

warrant is being obtained.[36] Additionally, the warrant requirement may be dispensed with if "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[37]

Warrantless searches have also been held valid in closely regulated industries (the "Administrative Exception").[38] The premise of allowing these searches is that the pervasive regulation of the industry diminishes the employees' expectation of privacy.[39] Warrantless searches may also be constitutional when they are necessary to further a regulatory scheme which is sufficiently comprehensive and defined so that the individual is aware that he may be subject to such a search.[40]

Furthermore, in Administrative Exception cases, there is generally a cogent federal interest in promoting public health and safety.[41] Requiring a warrant would, in many cases, frustrate that purpose.[42] The regularity and certainty of a comprehensive regulatory inspection scheme is a constitutionally valid substitute for a warrant because it safeguards individual privacy interests.[43] It is under the Special Needs and Administrative Exceptions that the government justified its warrantless searches in *Skinner* and *Van Raab*.[44]

B. *The Historical Drug Testing Cases*

The taking of blood samples,[45] and urine samples[46] constitutes a search and seizure under the fourth amendment. Additionally, breath tests have also been held to be a search and seizure.[47] The drug testing cases, therefore, require a fourth amendment balancing of individual privacy interests against the asserted governmental interests.[48]

Cases involving the intrusiveness of warrantless drug testing have gone both ways.[49] One of the first cases to deal with this issue was de-

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tory searches, searches of children's possessions at school, and consent. *See* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 583 n.11 (9th Cir. 1988) (citing cases).

36. *Terry*, 392 U.S. at 24 (threat of immediate danger to police officer); Schmerber v. California, 384 U.S. 757, 770 (1966).

37. Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

38. Donovan v. Dewey, 452 U.S. 594 (1981) (mines); United States v. Biswell, 406 U.S. 311 (1978) (guns); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor); Shoemaker v. Handel, 795 F.2d 1136 (3rd Cir. 1986), *cert. denied*, 479 U.S. 986 (1987) (horseracing).

39. Donovan v. Dewey, 452 U.S. 594 (1981).

40. *Id.* at 600.

41. *See supra* note 38.

42. *Donovan*, 452 U.S. at 603.

43. *Id.*

44. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1414 (1989); National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1390 (1989).

45. Schmerber v. California, 384 U.S. 757 (1966).

46. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

47. *Skinner*, 109 S. Ct. at 1412.

48. *See supra* notes 25-30 and accompanying text.

49. *See infra* notes 50-69 and accompanying text. *But see supra* note 14 (requiring some level of individualized suspicion).

cided in 1976.[50] In *Division 241 Amalgamated Transit Union v. Suscy*, the United States Court of Appeals for the Seventh Circuit upheld the constitutionality of the Chicago Transit Authority's ("CTA") rules requiring bus drivers to submit to blood and urine tests after serious accidents or upon a suspicion of intoxication or being under the influence of drugs.[51] The court applied the balancing test[52] and found that the state had advanced its compelling public safety interest by insuring the drivers fitness for duty. Furthermore, the court concluded that bus drivers have no reasonable expectation of privacy.[53]

Likewise, in *Allen v. City of Marietta*,[54] the court found that requiring government employees engaged in extremely hazardous work to submit to urine tests was reasonable.[55] There was evidence that the tested employees had used drugs while on duty thereby creating a threat to the public.[56] Because there was actual evidence of the employees' drug use, the test was clearly based on reasonable suspicion.

It was not until July 1986 that a court first upheld a random drug testing program of civilian employees.[57] In *Shoemaker v. Handel*, regulations promulgated by the New Jersey Racing Commission required jockeys to undergo breath and urine testing to detect alcohol or drug use.[58] A warrant was not required because the search fell within the Administrative Exception.[59] The governmental interest advanced was assuring the public of the integrity of persons involved in the horse-racing industry.[60] The jockeys, on the other hand, asserted that random drug testing without suspicion violated their fourth amendment rights. The court, however, found that the jockeys had a diminished expectation of privacy since horse-racing was one of the most highly regulated industries in the state.[61] Additionally, safeguards were provided against invasions of the jockeys' privacy interests in that the State Racing Steward had no discretion in conducting the test.[62]

Warrantless drug testing cases subsequent to *Shoemaker* generally required some level of individualized suspicion before an employee could be subjected to a drug test.[63] However, in 1987, the United States

50. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1977).

51. *Id.* at 1266.

52. *See supra* notes 25-30 and accompanying text.

53. *Suscy*, 538 F.2d at 1267.

54. 601 F. Supp. 482 (N.D. Ga. 1985).

55. *Id.* at 491.

56. *Id.* at 495.

57. Shoemaker v. Handel, 795 F.2d 1136 (3rd. Cir. 1986). For a discussion of the history of drug testing cases, see Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201 (1986).

58. *Shoemaker*, 795 F.2d at 1138-39.

59. *Id.* at 1142.

60. *Id.*

61. *Id.* at 1141-42.

62. *Id.* at 1143.

63. *See, e.g.*, American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) (finding mandatory periodic drug testing of police employees holding crit-

Court of Appeals for the Eighth Circuit followed the Third Circuit's lead by upholding the validity of a random drug testing program.[64]

In *McDonnel v. Hunter*, Department of Corrections employees having day-to-day contact with prisoners were required to submit to a urinalysis either by random selection or on the basis of reasonable suspicion.[65] When based upon suspicion, the court determined that reasonable suspicion rather than probable cause was the appropriate standard.[66] The warrantless searches also fell under the Administrative Exception.[67] The court found that the state had a significant interest in safeguarding its correctional institutions while the employees had a reduced justifiable expectation of privacy.[68] Additionally, the court felt that urinalysis was the least intrusive method of detecting drug use.[69]

II. RAILWAY LABOR EXECUTIVES ASS'N V. SKINNER

A. *Facts*

The Railway Labor Executives' Association ("RLEA") and its various member labor organizations brought suit to enjoin two Federal Railroad Administration ("FRA") regulations that provide for warrantless drug testing of certain employees without individualized suspicion. One regulation ("Subpart C")[70] mandates blood and urine tests for employees involved in a major accident,[71] an "impact" accident[72] or a fatal accident.[73] The other regulation ("Subpart D")[74] authorizes, but does not require, breath or urine tests[75] of certain employees if: (1) a super-

ical jobs unreasonable absent individualized suspicion); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (finding mass drug testing of firefighters unreasonable absent individualized suspicion); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (finding mass drug testing of firefighters unreasonable without individualized suspicion).

64. McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987).

65. *Id.* at 1308.

66. Probable cause, in the administrative search context, is not established by a "quantum of evidence;" it merely refers to a "requirement of reasonableness." Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1987). In other contexts, probable cause is used to refer to "a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as 'reasonable suspicion.' " *Id.*

67. *McDonell*, 809 F.2d at 1308. Reasonable suspicion requires that suspicion be based on specific objective facts and rational inferences based on experience. *See also* Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982).

68. *See supra* notes 38-44 and accompanying text.

69. *McDonell*, 809 F.2d at 1308.

70. 49 C.F.R. § 219.201-.213 (1988).

71. A "major" train accident is one involving one or more of the following: (1) a fatality; (2) a release of hazardous materials accompanied by an evacuation or a reportable injury (e.g., from fire, explosion, inhalation, or skin contact with the material); or (3) damage to railroad property of $500,000 or more. 49 C.F.R. § 219.201(a)(1) (1988).

72. An "impact" accident is one resulting in: (1) a reportable injury; or (2) damage to railroad property of $50,000 or more. 49 C.F.R. § 219.201(a)(2) (1988).

73. A "fatal" train accident is one that involves a fatality to any on-duty railroad employee. 49 C.F.R. § 219.201(a)(3) (1988). However, no test is required in the case of a collision between railroad stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing. 49 C.F.R. § 219.201(b) (1988).

74. 49 C.F.R. § 219.301-.309 (1988).

75. 49 C.F.R. § 219.301(a) (1988).

visory employee has a reasonable suspicion that the employee is currently under the influence of, or impaired by, alcohol or a controlled substance;[76] (2) the employee has been involved in a reportable accident or incident and the supervisory employee has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident;[77] or (3) the employee violated a safety regulation.[78]

The district court granted summary judgment for the government and upheld the validity of the testing procedure. Although railroad employees have an interest in the "integrity of their bodies" which deserves protection under the fourth amendment,[79] the court found this interest was outweighed by the government's substantial interest in promoting railroad safety.[80] The United States Court of Appeals for the Ninth Circuit reversed,[81] holding that a "particularized suspicion is essential" to finding toxicological testing of employees reasonable.[82] The Supreme Court granted *certiorari*.

B. *Supreme Court Decision*

1. Majority Opinion

First, the Court determined that the blood and urine tests were at-

76. For a breath test, the supervising employee must reasonably suspect that the employee is currently under the influence of, or impaired by, alcohol or alcohol in combination with a controlled substance. Reasonable suspicion must be based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee. 49 C.F.R. § 219.301(b)(1) (1988). For a urine test, the supervisory employee must have a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol or a controlled substance, based on specific personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee. However, an employee may be subjected to a urine test only if the determination is made by at least two supervisors, at least one of whom must have received at least three hours of training in the signs of drug intoxication. 49 C.F.R. § 219.301(c)(2) (1988).

77. 49 C.F.R. § 219.301(b)(2) (1988).

78. 49 C.F.R. § 219.301(b)(3) (1987). The employee must have been involved in one of the following operating rule violations or errors: (1) noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other direction with respect to movement of a train that involves: (A) occupancy of a block or other segment of track to which entry was not authorized; (B) failure to clear a track to permit opposing or following movement to pass; (C) moving across a railroad crossing at grade without authorization; or (D) passing an absolute restrictive signal or passing a restrictive signal without stopping (if required); (2) failure to protect a train as required by a rule consistent with § 218.37 of this title; (3) operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less; (4) alignment of a switch in violation of a railroad rule or operation of a switch under a train; (5) failure to apply or stop short of derail as required; (6) failure to secure a hand brake or failure to secure sufficient hand brakes; or (7) in the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.

79. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1410 (1989).

80. *Id.*

81. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988).

82. *Id.* at 587.

tributable to the government.[83] The Court found that a railroad that complies with Subpart C does so by compulsion of sovereign immunity, thereby coming within fourth amendment coverage.[84] Furthermore, by promulgating Subpart D, the government conferred a right upon the FRA to receive biological samples and test results.[85] Moreover, the Subpart D regulations preempted state law and was intended to supersede collective bargaining agreements.[86] The Court concluded that the government had more than a passive role with respect to the testing, thereby implicating the fourth amendment.[87]

The second issue was whether the drug tests were searches[88] or seizures.[89] The Court held that the blood tests, urinalyses, and breath tests all constituted searches under the fourth amendment. The tests intruded on an individual's expectation of privacy which society had recognized as reasonable.[90] The Court also found that the tests failed to constitute a seizure because they did not interfere with the employee's freedom of movement.

The third issue was whether the warrantless drug testing of employees without individualized suspicion was reasonable under the fourth amendment. While acknowledging that a warrant is generally required to make a search reasonable,[91] the Court noted that sometimes "special needs, beyond normal law enforcement may make the warrant and probable cause requirements impracticable."[92] To ascertain whether the Government had a "special need" the Court balanced the intrusion on the individual's privacy interest against the promotion of legitimate governmental interests.[93]

The interest advanced on behalf of the government was ensuring the safety of railroad passengers.[94] RLEA did not dispute the fact that employees subject to testing held safety sensitive positions[95] and the Court recognized public safety as a valid interest.[96] However, the Court had to determine if that interest was strong enough to justify an intrusion on the employees' privacy absent a warrant.

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83. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1411-12 (1989). The fourth amendment is only applicable to the government, its agents or instruments. Therefore, the railroad had to be acting as an agent or instrument of the government in order for the intrusion to be analyzed under the fourth amendment.

84. *Id.* at 1411.

85. *Id.*

86. *Id.*

87. *Id.* at 1412.

88. *See supra* notes 17-19 and accompanying test for definition of "search."

89. *See supra* notes 20-21 and accompanying text for a definition of "seizure."

90. *Skinner*, 109 S. Ct. at 1412. *See supra* notes 27-30 and accompanying text regarding expectation of privacy.

91. *Skinner*, 109 S. Ct. at 1414.

92. *Skinner*, 109 S. Ct. at 1414.

93. *Id.*; *see supra* notes 31-37 and accompanying text regarding "special needs" and *see supra* notes 25-30 and accompanying text regarding balancing tests.

94. *Skinner*, 109 S. Ct. at 1414.

95. *Id.*

96. *Id.*; *see also Skinner*, 109 S. Ct. at 1402 (noting the extensive problem of drug and alcohol abuse in the railroad industry).

The Court noted that the purpose of a warrant is to assure that searches or seizures are not random or arbitrary.[97] Furthermore, a warrant ensures that a search is narrow in scope.[98] Finally, a warrant requires that a neutral magistrate determine whether the intrusion is justified.[99]

The Court found that requiring a warrant under the circumstances would not further these aims.[100] The Court reasoned that the regulations were specific and well-known to the employees and that they required little discretion to administer.[101] Moreover, while time was spent obtaining a warrant, evidence of the metabolites of the drugs may be destroyed.[102]

The Court compared *Skinner* to other cases where the warrant requirement was found to be inappropriate.[103] It observed that railroad supervisors were not familiar with the "intricacies of . . . Fourth Amendment (sic) jurisprudence"[104] and held that a warrant was not essential to make the searches in this case reasonable.[105]

Even though the Court determined that a warrant was not required, warrantless searches generally require "some quantum of individualized suspicion" to make the search reasonable.[106] However, the Court noted that such a requirement was not a "constitutional floor" beyond which a search would be unreasonable.[107] The Court also stated that when an individualized suspicion requirement may jeopardize a valid governmental interest, the search should be upheld despite the absence of an individualized suspicion.[108]

The Court then weighed the asserted individual privacy interests and found that neither the blood test,[109] the urinalysis[110] nor the breath test[111] was a significant intrusion on those interests. Furthermore, the Court established that the employees had a diminished expectation of privacy because they were employed in a pervasively regulated indus-

97. *Id.* at 1415.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 1415-16.
103. *Id.*; *see also* O'Connor v. Ortega, 480 U.S. 709 (1987) (hospital administrator not required to obtain warrant to search employee's office); New Jersey v. T.L.O., 469 U.S. 325 (1985) (school official not required to obtain warrant before searching students' personal belongings).
104. *Skinner*, 109 S. Ct. at 1416.
105. *Id.*
106. *Id.* at 1417.
107. *Id.*
108. *Id.*
109. The intrusion resulting from the taking of blood tests is "not significant . . . [and] such tests are common place." *Id.*
110. The Court was most concerned with the urine tests but ultimately found that because there was no direct observation and because the test was conducted in a medical environment, the intrusiveness of the collection was reduced. *Id.* at 1418.
111. Breath tests are conducted with "a minimum of inconvenience or embarrassment." *Id.* at 1417.

try.[112] These privacy interests were balanced against the government's interest in preventing harm to railroad passengers from employees in safety-sensitive positions. The Court held that the government interest outweighed the individual interest and, therefore, displaced the individualized suspicion requirement.[113] Finally, the Court asserted that the regulations would also detect and deter drug use.

2. Concurring Opinion

Justice Stevens concurred that the government's interest significantly outweighed the intrusion on an individual's privacy.[114] However, he disagreed with the majority's rationale that the regulations would deter drug use.[115]

3. Dissenting Opinion

The dissent, while acknowledging the severity of the drug problem, criticized the majority for "[allowing] basic constitutional rights to fall prey to momentary emergencies."[116] Justice Marshall, joined by Justice Brennan, suggested that the majority was taking another dangerous step towards reading the probable-cause requirement out of the fourth amendment entirely and replacing it with the "special needs" test.[117] The dissenters also suggested that without the probable cause requirement, the fourth amendment is devoid of the meaning which the framers intended to give it.[118] Furthermore, according to the dissenters, the probable cause requirement has traditionally been "an indispensable prerequisite" to conducting searches[119] and that, even when the "Rorschach-like"[120] balancing test has been applied, searches have generally been upheld as reasonable only when supported by probable cause.[121]

The majority was further criticized for expanding the "special needs" exception and allowing the deepest intrusion into individual privacy, all without any level of individualized suspicion.[122] While the dissenters did recognize the dangers associated with drug use by employees in safety-sensitive positions, they stressed that even laudable goals cannot justify abrogating the express words of the Constitution.[123]

112. *Id.*; *see supra* notes 38-44 and accompanying text regarding the Administrative Exception to pervasively regulated industries.

113. *Id.* at 1421.

114. *Id.* at 1422 (Stevens, J., concurring).

115. *Id.* ("If the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior.").

116. *Id.* at 1423 (Marshall, J., dissenting). Another opponent of drug testing, George Lundberg, editor of the *Journal of the American Medical Association*, labeled such programs "Chemical McCarthyism." SCIENCE, Nov. 6, 1987, at 744.

117. *Skinner*, 109 S. Ct. at 1423.

118. *Id.*

119. *Id.*

120. *Id.* at 1425.

121. *Id.* at 1424.

122. *Id.* at 1425.

123. *Id.* at 1426. "There is no drug exception to the Constitution, any more than there

The dissenters also felt that the traditional fourth amendment analysis[124] should have been applied instead of the "special needs" balancing test. Under the traditional framework, a warrant could have been obtained.[125] The dissenters argued that there was actually more than one search at issue — specifically, the collecting and chemical analysis of both blood and urine. While the dissenters conceded that exigent circumstances justified the waiver of the warrant for collecting the samples, they maintained that nothing prevented the employer from obtaining a warrant before performing the chemical analysis.[126] Furthermore, the dissenters argued that the testing procedures were highly intrusive, and, therefore, a finding of probable cause was necessary.[127] The dissenters said that because the majority allowed a highly intrusive search without any level of suspicion its reasoning was clearly erroneous.[128]

The dissenters also argued that other privacy interests were at stake because other personal information can be uncovered from tests of bodily fluids.[129] Furthermore, the dissenters suggested that individual privacy rights were invaded further by allowing criminal prosecutors access to the test results.[130] The tests themselves were also criticized because they did not measure current impairment.[131] Finally, the dissenters concluded by asserting that the majority's deterrence rationale was simply absurd.[132]

III. NATIONAL TREASURY EMPLOYEES UNION v. VON RAAB

A. *Facts*

The National Treasury Employees Union ("NTEA"), a federal employment labor union, brought suit against the Commissioner of the United States Customs Service ("Service")[133] challenging the constitutionality of the Service's drug-screening program. Employees seeking a transfer or promotion to a position involving drug interdiction, the carrying of firearms, or the handling of "classified" information[134] were

is a communism exception or an exception for other real or imagined sources of domestic unrest." *Id.* (quoting Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971)).

124. First, has a search taken place? Second, was the search made pursuant to a warrant or undertaken pursuant to a recognized exception to the warrant requirement? Third, was the search based on probable cause or validly based on lesser suspicion because it was minimally intrusive? Lastly, was the search conducted in a reasonable manner? *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Skinner*, 109 S. Ct. at 1429. Not only can drug and alcohol use be discovered but so can other disorders such as epilepsy, diabetes or clinical depression. *Id.*

130. *Id.* at 1431.

131. *Id.*

132. "It is simply implausible that testing employees after major accidents occur . . . will appreciably discourage them from using drugs or alcohol." *Id.* at 1432.

133. An important responsibility of the Customs Department is the interdiction and seizure of contraband, including illegal drugs. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1387 (1989).

134. *Id.* at 1388.

required to submit to urinalysis.[135] The transfer or promotion was contingent upon giving a urine sample.

NTEA claimed that the testing program violated the fourth amendment because there was no requirement of probable cause or individualized suspicion. The district court held that the testing program violated the fourth amendment, and, accordingly, enjoined its enforcement. The United States Court of Appeals for the Fifth Circuit vacated the injunction[136] and held that the testing program constituted a reasonable search because the government had a compelling interest in detecting employee drug use and because the search was limited in scope. The Supreme Court granted *certiorari*.

B. *Supreme Court Decision*

1. Majority Opinion

After analyzing *Skinner*, the Court analyzed the instant case on a similar basis — namely, whether the testing program at issue met the reasonableness requirement of the fourth amendment.[137]

The government interests advanced were the detection and deterrence of drug use.[138] Writing for the Court, Justice Kennedy found that these interests constituted a "special need"[139] which justified dispensing with the warrant and probable cause requirements.[140]

NTEA conceded that a warrant was not required[141] but argued that the testing program should still be based on probable cause. The Court, however, balanced the government's interests against the intrusion on individual privacy rights and concluded that the government's need to conduct suspicionless searches was more important.[142] Specifically, the Court found that the government had a compelling interest in ensuring that employees involved in drug interdiction have "unimpeachable in-

135. Two tests are used. Initially, samples are tested using the enzyme-multiplied-immunoassay technique ("EMIT") manufactured by the Syva Company of Palo Alto, California. If a sample tests positive for the presence of marijuana, cocaine, opiates, amphetamines or phencyclidine ("PCP"), it must be confirmed by using the gas chronography/mass spectrometry technique ("GC/MS"). *Id.* at 1389. The EMIT test is less expensive but may provide false readings between 5% to 20% of the time. The GC/MS, on the other hand, is nearly 100% accurate. Rust, *The Legal Dilemma*, A.B.A. J., Nov. 1, 1986, 51, 52. For further discussion on the methodologies of the EMIT and GC/MS tests see *Symposium on Drug Use in the Workplace*, BULL. N.Y. ACAD. MED., Feb. 1989; Note, *Use and Abuse of Urinalysis Testing in Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1011 (1986).

136. 816 F.2d 170 (5th Cir. 1987).

137. *See supra* notes 25-30 and accompanying text regarding the determination of reasonableness by using the balancing test.

138. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1390 (1989).

139. *Id.*; *see also supra* notes 31-37 and accompanying text regarding "special needs."

140. *Von Raab*, 109 S. Ct. 1391.

141. *Id.* The Court affirmed that no warrant was required because the intrusion was narrowly defined and well-known to the employees. Additionally, the process was automatic and allowed no room for discretion. Therefore, the need for a neutral magistrate to evaluate special facts was eliminated. *Id.*

142. *Id.*

tegrity and judgment."[143] Furthermore, the Court found a compelling governmental interest in protecting the public from promoting an employee with impaired perception and judgment to a position that required the carrying of a firearm.[144] Finally, a governmental interest was also found in protecting "truly sensitive information" from an employee who might compromise such information.[145]

Balanced against these interests were the rights of individual privacy. The Court determined that Service employees had a diminished expectation of privacy[146] and that, therefore, the government's interest outweighed the individual's interest. Nevertheless, NTEA maintained that the program was unjustified because it was not implemented in response to a perceived drug use problem and because the program was not sufficiently effective.[147] The Court, however, upheld the validity of the suspicionless tests for jobs involving drug interdiction and the use of firearms.[148] While the Court seemed to indicate that it might uphold the testing of employees who handle "truly sensitive" information,[149] it did not specifically decide that issue.[150] The primary issues on remand were to determine what materials were "classified" and which categories of employees were subject to testing.[151]

2. Dissenting Opinion

In a strong dissent, Justice Scalia, joined by Justice Stevens, argued that the search upheld in *Von Raab* was clearly unreasonable. In *Skinner*, there was clear evidence of drug and alcohol use and a causal connection between such use and a serious threat to public safety. However, in *Von Raab*, there was no evidence of drug use by Service employees.[152] In fact, it appeared in the record that the Commissioner had stated that the Service was, in his opinion, "largely drug free."[153]

Justice Scalia further argued that the majority was searching in vain for a problem which could be remedied simply by drug testing. According to Justice Scalia, the majority's parade of horribles — i.e., potential for bribery, employees unsympathetic to their mission of drug interdiction, and impairment of perception or judgment — are pure specula-

143. *Id.* at 1393.
144. *Id.*
145. *Id.* at 1396.
146. *Id.* at 1394.
147. *Id.* Indeed, only 5 out of 3600 employees tested positive. Additionally, NTEA claims employees can avoid detection by abstaining for a few days before the test or by adulterating their sample. *Id.*
148. *Id.* at 1396.
149. *Id.* "We readily agree that the Government has a compelling interest in protecting truly sensitive information from those who, under compulsion of circumstances or for other reasons, . . . might compromise [such] information." *Id.* (quoting Department of Navy v. Egan, 484 U.S. 518 (1988)).
150. The Court remanded the issue to the court of appeals.
151. *Von Raab*, 109 S. Ct. at 1398.
152. *Id.* at 1398 (Scalia, J., dissenting).
153. *Id.* at 1400.

tion.[154] Instead, Justice Scalia contended that the government's true interest was to set an example with the Service's testing program in response to a societal problem rather than to remedy an existing problem in the Service.[155]

While Justice Scalia acknowledged that there are valid exceptions to the requirement of particularized suspicion, the exceptions are generally based on well-demonstrated evils in the specific field.[156] The dissenters argue that in *Von Raab* there was no such demonstration and the testing was allowed only to remedy a general social harm.[157] The dissenters recognized that while eliminating drug use may be a commendable goal, it is an unacceptable justification for invading an individual's fourth amendment rights.[158]

Justices Marshall and Brennan also dissented for the reasons stated in Justice Scalia's dissent and for the reasons set forth in the dissenting opinion in *Skinner*.

IV. COMMENTS

The Supreme Court trivialized the fourth amendment protections against unreasonable searches and seizures by its pronouncements in *Skinner* and *Von Raab*. While courts have been almost unanimous in requiring some level of individualized suspicion before allowing mass drug testing,[159] railroad workers and Service employees may now be subjected to intrusive searches without *any* showing of particularized suspicion.

However, the impact of the *Skinner* and *Von Raab* decisions may not be as devastating as it initially seems. The government was not given carte blanche to test all governmental employees in all cases. These decisions are limited to safety-sensitive positions,[160] drug interdiction positions,[161] positions requiring the carrying of firearms,[162] and positions

154. *Id.*

155. *Id.* at 1401 ("To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the Service is 'clean,' and . . . will demonstrate the determination of the Government to eliminate this scourge of our society!").

156. *Id.*

157. *Id.*

158. *Id.* ("[T]he impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.").

159. In 1986, *Shoemaker* and *McDonnel* were decided. These cases clearly fell within the administrative exception to highly regulated industries. *See supra* notes 57-69 and accompanying text. Additionally, many courts viewed *Shoemaker* as an aberration. *See* Note, *Random Drug Testing in the Government Sector: A Violation of Fourth Amendment Rights?* TUL. L. REV. 1373, 1383; *see also* American Fed'n of Government v. Weinberger, 651 F. Supp. 726, 735 (S.D. Ga. 1986) ("The facts of *Shoemaker* are distinguishable from the facts before the court and, as the trend of recent cases indicates, the decision does not seem to be in keeping with the prevailing case law.").

160. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1421 (1989).

161. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1394 (1989).

162. *Id.*

involving access to classified information.[163] The Court did not define which "safety-sensitive" positions are subject to testing[164] nor did it discuss random drug testing. The exclusion of a discussion on random testing is significant because current Department of Transportation regulations[165] mandate random drug testing. The Court limited its decision to the specific facts of each case.

It appears from *Skinner* and *Von Raab* that the Court is all too willing to disregard the requirement of reasonable individualized suspicion in drug testing cases. However, cases decided subsequent to *Skinner* and *Von Raab* may provide some clue as to whether the requirement will be read out completely.

One of the first cases decided after *Skinner* and *Von Raab* upheld the validity of drug testing as a part of a routine medical examination.[166] In *Jenkins v. Jones*,[167] a school bus attendant involved in the transportation of handicapped children brought suit to enjoin the use of a urinalysis testing program. In light of *Skinner* and *Von Raab*, the Court found that the government had a legitimate interest in the children's safety which outweighed the individual's expectation of privacy. It must be noted, however, that a reasonable suspicion of drug use did exist.

Random drug testing was also recently addressed in *Hartness v. Bush*.[168] In that case, employees of the Executive Office of the President and the General Services Administration sought to enjoin a drug testing program. The program required urinalysis of employees in "sensitive" and safety-related positions. The court was unwilling to allow random testing since there was no reasonable, articulable and individualized suspicion of drug use. The court observed that, as a result of *Skinner* and *Von Raab*, particularized suspicion was not a requirement in performing mass drug tests, however, the court concluded that there must still be some sort of *generalized* suspicion.[169] Because neither individualized nor generalized suspicion was present, the random drug testing program was enjoined.[170]

Probably the most significant decision handed down after *Skinner* and *Von Raab* dealt with the Department of Justice's random drug testing program.[171] The challenged program required prosecutors in criminal cases, employees with access to grand jury proceedings, and personnel holding top secret national security clearances to be subject to random urinalysis.[172]

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163. *Id.* at 1398.

164. The Court did not give an indication as to what it thought about positions requiring a "high degree of trust and confidence" such as are included in the Department of Defense regulations and the Drug Free Workplace Act.

165. *See supra* note 7.

166. Jenkins v. Jones, 109 S. Ct. 1633 (1989).

167. *Id.*

168. 712 F. Supp. 986 (D.D.C. 1989).

169. *Id.* at 991.

170. *Id.* at 994.

171. Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989).

172. Incumbents serving under Presidential appointment and incumbents whose duties

Like *Von Raab*, the governmental interests advanced were the integrity of the workforce, public safety, and protection of sensitive information.[173] With respect to the integrity interest, the court noted that the government may only search its employees "when a clear [and] direct nexus exists between the nature of the employee's duty and the nature of the feared violation."[174] No such nexus existed in this case. Consequently, the court found that the integrity interest could not justify the testing.

The court likewise held that the public safety interest was not a sufficient justification. The court distinguished the public safety rationale in *Von Raab* and *Skinner* from that advanced by the Justice Department. *Von Raab* dealt with the immediacy of the threat while in the Justice Department, "the chain of causation between misconduct and injury is considerably more attenuated."[175]

The only governmental interest which was held to justify the intrusion of drug testing was the protection of confidential information. Citing *Von Raab* the court found that "truly sensitive" information most assuredly includes top national security information.[176] The court held that employees with top secret national security clearance may be subject to random drug testing.[177]

The *Harmon* decision is significant for two reasons. First, it clarifies the "classified information" interest advanced in *Von Raab*. Second, it addresses the validity of random drug testing programs, something both *Von Raab* and *Skinner* refused to do. The *Harmon* decision carefully limited the scope of the confidential information interest and recognized that "truly sensitive information . . . cannot include *all* information which is confidential or closed to public view."[178]

Since the Department of Justice's random drug testing program was upheld, similar programs in the Department of Education[179] and the Department of Transportation[180] have also been upheld as constitutional.

V. CONCLUSION

It appears that courts are willing to sacrifice the fourth amend-

include "maintaining, storing or safeguarding a controlled substance" are also subject to testing. *Id.* at 486. None of the plaintiffs was a Presidential appointee, nor responsible for controlled substances, therefore, the challenge to the drug testing program was limited to the three delineated positions. *Id.* at 487.

173. *Id.* at 489.

174. *Id.* at 490.

175. *Id.* at 491.

176. *Id.* at 491-92.

177. *Id.* at 492

178. *Id.*

179. American Fed'n of Gov't Employees v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989) (upholding random drug testing of guards, motor vehicle drivers, and employees with access to sensitive information).

180. American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989) (upholding random drug testing of employees having a direct impact on public health, safety or national security).

ment's individualized particularized suspicion requirement in order to win the war on drugs.[181] Admittedly, getting rid of drugs is a laudable goal. However, as the court in *Capua v. City of Plainfield*[182] said:

> If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we will have transformed our country into a police state and abandoned one of the fundamental tenets of our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle.[183]

Maury Lauer Cujé

181. *See* Wermeil, *Court's Conservative Majority Begins to Make It's Mark*, Wall Street Journal, July 5, 1989, at B1, col. 4.
182. 643 F. Supp. 1507, 1511 (D.N.J. 1986).
183. *Id.* at 1511.